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KC

THE KING'S COUNSEL

MAGAZINE

His Honour Judge Barrington Black KC

INTERVIEW
His Honour Judge Barrington Black KC on his book Both Sides of the Bench and on British justice system.

Prof. Joe McIntyre (University of South Australia) On the Judicial Dissent

Lord Hailsham's Coded Diary

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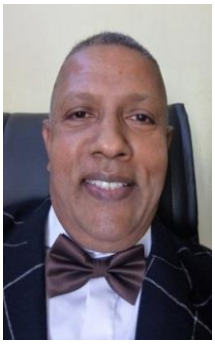
EDITORIAL



No justice system in the world is immune from criticism. The British justice system though unique and far superior to some other countries with established legal systems is no exception. There have been plenty of issues and royal commissions appointed to look into the British justice system. When it comes to justice it is a concept that encompasses not only the law enforcement but a whole gamut of issues from miscarriage of justice, police brutalities, prison conditions, economic, social and psychological aspects and ambience in which prisoners are reformed, rehabilitated and released back to the society. The recidivism or the levels of repeat offenders back in the prison are the social evils that need proper research. **Her Honour Wendy Joseph KC** book **Unlawful Killings** and **Prof. Leslie Thomas KC** book **Do Right and Fear No One** have highlighted the social evils in the British justice system. Truly a Royal Commission should be commissioned to investigate the evils that bedevil the system as highlighted in the two books above.

We have interviewed **His Honour Justice Barrington Black KC** on his book **Both Sides of the Bench** yet another eye opener in the British justice system. He has had a very long judicial career having been crawled up the upper rung of the ladder being the Justice of the Supreme Court of Gibraltar. He has served 26 years on the bench - perhaps second only to Lord Denning. The Law Society Gazette called him the 'rock star'.

Judicial dissent is very common in the U.S and Australian judiciary. **Hon. Michael Kirby** and **Hon. Dyson Haydon** were the most controversial justices of the High Court of Australia who were known as Great Dissenters. We reproduce here **Prof. Joe Intyre's (of the University of Western Australia)** critique of judicial dissents. He defends the role of dissent and the vital role it plays in strengthening the judicial function. The absence of dissent is like a court without advocacy. It must rather be encouraged in this 21st century where access to legal scholarship and comparative jurisprudence is at the touch of a button.

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01st November 2022

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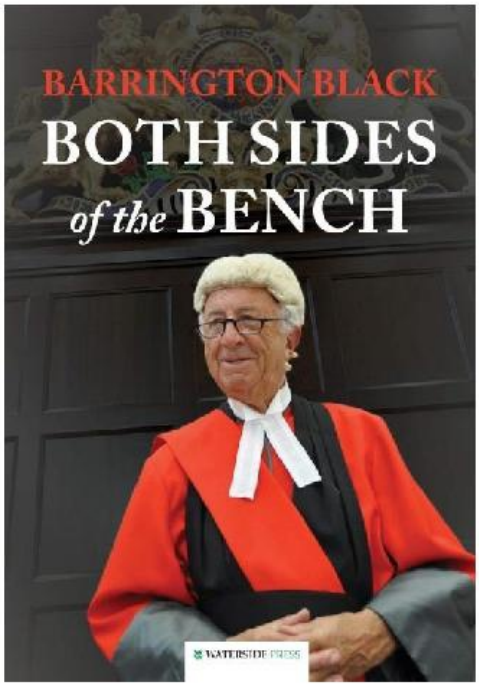
University Presses and Book Reviewers may contact the Magazine for book reviews on new law publications. The ideal word length should be around 1000 words in a clear format preferably on Word document. However if a longer review is needed prior consensus must be had as editing would vitiate the essence and the quality of the review.

INTERVIEW - HIS HONOUR BARRINGTON BLACK KC



KC-The King's Counsel Magazine: Justice Barrington Black KC what a great pleasure it is to have you featured in our Magazine and we must thank you for the opportunity to conduct this interview. You have had a very distinguished judicial career spanning several decades and the time of your retirement you had reached 82. A remarkable feat in judicial career; having come closer to the record retirement age of Lord Denning who retired at the age of 83. I would imagine you must have had a bird's eye view of the operation of the law and justice in UK. Your honour were a Judge of the Supreme Court of Gibraltar. Your book is titled **Boths sides of the Bench** published by Waterside Press UK (which is available on Amazon.com). What did you see from both sides? You must have seen the uses and abuses of the justice system of UK. You have mentioned that in your book. Expatiate Sir your thoughts on the British justice system.

His Honor Justice Barrington Black KC: I say without hesitation that the British Judicial System is the best in the world. It is the leading system from which many others have sprung, but few have been able to improve. Let me start with one example, the Jury system, described by Lord Devlin as "the lamp that shows that freedom lives" the simple act of appointing 12 people at random, also used in the American system but with one difference, the choice, in the English system, truly random, but in America subject to a complicated selection procedure which eliminates that random aspect.

Perhaps the greatest abuse of the English System, however has been the limits placed on another requisite, that is the provision of a competent advocate for the underdog, to ensure a level paying field. If the availability of such assistance is curtailed by inadequate remuneration then the system fails. If cases are not heard speedily, after the event, so that memory is clear, the system fails. If the number of Judges and provision of Courtroom accommodation is curtailed, then the system fails, and these have all happened in recent years in England due to Government reluctance to provide proper financial support.

KC-The King's Counsel Magazine: During your judicial year legal career, what was the most challenging or knottiest legal dispute you ever had to deal with either as a Barrister or as a Judge?

His Honor Justice Barrington Black KC: The "knottiest" perhaps not quite dispute, but problem, was that of sentencing in historical cases. An elderly defendant, sometimes in his eighties charged with an offence, generally sexual and often involving young people, which had happened

many years earlier, sometime up to 40 years ago, serious in themselves and which had affected the victim, but in the period between that happening, and the time of trial , the defendant had led an unblemished life. Often doing outstanding work in the community. The defendant had to be punished, particularly because of that effect on the victim, the guidelines showed particularly heavy punishment, and I found that a most unpleasant duty.

KC-The King's Counsel Magazine: During your decades long career as a Judge, have you ever confronted counsels who were either being very disrespectful of the judiciary and or perhaps in some cases you must have had some verbal duels with them. How were you able to maintain proper decorum in the court house?

His Honor Justice Barrington Black KC: I rarely came across disrespect for the judiciary. Hardly ever, and if I did it was from an inexperienced advocate who could soon be put right, not in front of the court, but by a quiet word after. Many advocates have thanked me in later life for that word that I quietly had with them. There were some older advocates who did not set a good example, but I realised their acts or words were more out of frustration at their own lack of progress in the profession, and I thought that was sufficient punishment. Defendants were surprisingly placid, I cannot recall single outburst from that direction, though there was one example at the Court where I sat.
The judge was also a Viscount, a kindly man, who on one occasion handed a severe penalty. The recipient uttered a four letter expletive. The Viscount called him back, and gently said "It may be that once you are released from prison, our paths may cross, and you seek to address me by a shortening of my title. Can I remind you that there is an "o" between the "c" and the "u".

KC-The King's Counsel Magazine: Do you think UK Judiciary has been able to serve the people and resolve many social issues. While you claim in your book your exposure dealing with many criminal cases where do you think the Judiciary has failed to serve the people of UK, you may refer to the experiences you had in Gibraltar for instance?

His Honor Justice Barrington Black KC: Gibraltar was a great experience. Based largely on English Law, but with the occasional difference, largely through them having delayed amendments which were in force in English Law. For example the rule of murder being a proper charge only if the deceased died within a year and a day after the infliction. This was changed in England some time ago, and I had to decide whether the change was meant to have also taken place in Gibraltar. I ruled it was so, and the man was acquitted. Juries were smaller, only 9, instead of 12 in England, but worked as well, though there were problems in such a small location oi finding people who did not know or were related to participants in the case. It sometimes took almost as long as the case to find a jury.

KC-The King's Counsel Magazine: You have covered many issues in your book, what is your assessment of the access to justice in UK - apart from the quality of justice? Do you think UK Judiciary, being one segment of the three pillars of government and UK being a country with a myriad of social issues, has not been able to do justice to the people in dispensing justice. Assume, your honor is going to have a

meeting with the Prime Minister tomorrow what would you tell him on legal reforms that are needed to improve the access to justice in UK or British criminal justice system.

His Honor Justice Barrington Black QC: So far as improvements to the system in England, and my ability to persuade the prime Minister to follow them. I am not optimistic, judging by the Prime Ministers in recent years there has been little understanding of the problems I mentioned earlier. Though at the time of writing, indeed on the very day, there have been enlightening judgments in the Courts. We had an outburst of statue, rather than statute destruction recently. People pulled down statues of men whom they believed were responsible for disagreeable acts, such as slavery. I agree, disagreeable, but part of history and you can't eliminate history by a physical act. They had pleaded entitlement to express an opinion, and that destruction was not intended.. they had been acquitted. The Court of Appeal has taken a different view, and "their human right" to protest in this way curtailed, quite right.

Equally the right of Counsel to strike, and contribute, by so doing, to the havoc of the Courts, again the Court has been sensible and given them and the Government a period of time to sort out their differences, and then, hopefully, get back to work. I would also tell the Prime Minister to return to the requirement that the Lord Chancellor be a Lawyer, or someone who has a deep knowledge of the Law. The two are not always complementary.

KC-The King's Counsel Magazine; During your long career, you have had wide exposure listening to the cross examination by counsels. You must have enjoyed the thrust and parry of cross examination from your vantage point. What was the most fascinating cross examination you could recall now and what type of questions were put to the witness and whether you can share some of the interesting anecdotes so that our younger counsels could pick up some expertise from you..

His Honor Justice Barrington Black KC: As to the cut and thrust of cross examination, this is a skill only picked up by watching others. Cross examination is one talent, and ability to address a Jury is another. There are different skills and different masters. The finest cross examination was by Harry Ognall QC , later Mr Justice Ognall, a very old friend of mine whose masterly cross examination of the medical experts in the case of The Yorkshire Ripper, Peter Sutcliffe in 1981, should be read by all would be advocates. He was brought into the prosecution team after the Attorney General did not seem to be making much headway.

On the other hand for an address to the Jury, the masterly speech by Gilbert Gray QC, another old friend of mine, and whom I instructed in the case of Donald Neilson, "the Black Panther", a case fully described in my book "Both Sides of the Bench" a man who kidnapped, and murdered a young girl, and who was also convicted of the murder of three sub-postmasters in 1975, was described as one of the most lucid and persuasive, a speech constructed in the face of overwhelming evidence, but dutifully pursued in the light of the instructions of our client.

KC-The King's Counsel Magazine: Finally Sir, what is your message to the junior Judges who sit in judgment

over many complex issues confronting the British society.

His Honor Justice Barrington Black KC: The Junior Judges, that is those sitting in the Courts of first instance, the Crown Courts in England are presently faced with an enormous back log of cases, some 60,000, and there is always a problem where cases are delayed of the memories both of accuser and victim being affected. Judges will need to be patient in these circumstances, and hope the Government will provide help by way of improved accommodation, technical help, and training for those who will follow in their footsteps, and in the meantime be trained as part time Recorders, for this is the best way oi understanding the need for effective trials, by recalling their own experiences as advocates, and here is the greatest aspect of our system, that Judges do not come straight from University as in some Countries, they come up the hard way knowing the problems which advocates must address.

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Lord Hailsham's Coded Diary

During the later part of his life Quintin Hogg - Lord Hailsham - kept an occasional political and personal diary, some of it in a form of shorthand system called 'Speedwriting' which he seems to have used as much for security as saving time. Margarett Thatcher Foundation has been granted exclusive rights to publish extracts online. The Foundation has successfully translated a number of the coded entries, with very generous help from some cryptanalysts at G.C.H.Q working in their spare time, the "Kryptos Society".

Quintin Hogg, Lord Hailsham (1907-2001), was a Conservative frontbencher and Cabinet Minister for more than 30 years, a semi-permanent fixture of the political scene who contrived, nonetheless, never to pass unnoticed. Briefly seen as a possible leader of the party in 1963, his eccentricity, excitability and lawyerly erudition made him an implausible candidate for the very highest office, though the same attributes made him among the most interesting and engaging political figures of his time. He was an influential figure in the government of Harold Macmillan, 1957-63, and became the twentieth century's longest-serving Lord Chancellor, holding the position under Edward Heath 1970-74 and Margaret Thatcher 1979-87, during which period he played a dominant role in Conservative thinking on legal matters, if not the constitution (where the arguments over devolution, for example, often left him at odds with colleagues).

The Hoggs were a twentieth century political dynasty. Hailsham's father, Douglas, had been Lord Chancellor before him and a close confidante of Stanley Baldwin, while Hailsham's eldest son, also named Douglas, became a Cabinet Minister under John Major. Winning many of Oxford's glittering prizes, culminating in a fellowship at All Souls, Hailsham became a barrister before entering the Commons at the intensely controversial Oxford by-election in 1938, defeating an anti-appeasement candidate in the form of the left-leaning Master of Balliol, A.D. Lindsay, Britain's agonies over policy towards the Nazis playing out against the backdrop of university politics. Such early exposure to national attention perhaps encouraged a certain showmanship in Hailsham's character.

Tagged an appeaser, he belied the reputation on 8 May 1940 by voting against Chamberlain's government in the confidence motion that precipated the latter's resignation and the formation of the Churchill coaltion. Hailsham then spent several years on active service in the Middle East, where

he first kept a diary. (The volume covering his wartime experiences would probably merit publication in itself.) Returning to the Commons due to illness, he was a founder, with Lord Hinchingbrooke, of the Tory Reform Committee and was generally reckoned a rising hope of the progressive wing of the party, and one of its ablest polemicists.

But Hailsham's political prospects were always limited by his standing in line to inherit a peerage, which would force his departure from the Commons on his father's death (an event which took place in 1950). During the Conservative Governments of 1951-64 he held a succession of significant but not quite crucial jobs, including the Admirality (during the Suez Crisis), Education, Science, the Lord Privy Seal and Leadership of the House of Lords, as well as the Party Chairmanship. By 1963, however, legislation was working its way through Parliament to allow peers to disclaim their titles, designed ostensibly to accommodate Tony Benn but naturally of far greater application to the Conservative Party than Labour. Hailsham now began to nourish the dream that he might succeed Macmillan as Prime Minister. At one point Macmillan seems to have encouraged him in the hope, though whether he ever really saw Hailsham in this way is debatable, and if he did, he certainly proved an unreliable friend, decisively favouring Alec Douglas-Home for the top job when illness led him to resign in October 1963.

Bitterly disappointed, Hailsham was not among those Conservatives who refused to serve in Home's Government, despite telling the new Prime Minister that he thought his tenure would prove a calamity for party and country. He went ahead and disclaimed his peerage, becoming MP for St Marylebone, and when the Party lost the General Election of 1964 became an important Opposition spokesman, notably for Home Affairs 1966-70 when (now under Heath's leadership) Enoch Powell made the topic of immigration a matter of burning priority. Hailsham strongly urged that Powell be sacked from the Shadow Cabinet when he made his "River Tiber" speech in April 1968. Like many Conservative frontbenchers, he was deeply angered by what he saw as Powell's disloyalty to party and leader, as well as fundamentally opposed to his views on race relations.

1970-74 HEATH'S LORD CHANCELLOR & THE CODED DIARY

When Edward Heath unexpectedly won the General Election of 1970 he appointed Hailsham Lord Chancellor, ending his come-back career in the Commons and extinguishing any remaining hope he might have had of occupying the most powerful offices of state. If Hailsham was disappointed, his new responsibilities provided many compensations, and some political opportunities too. Heath's attempt to tame the unions through reform of labour law, *via* the Industrial Relations Act 1971, put the courts into the frontline of political argument and made legal opinion more than usually central in cabinet decision-making. And Hailsham's previous political career gave him a public profile well beyond that possessed by the rather colourless, if able, career-lawyers who have usually occupied the post since WW2.

Hailsham now resumed his diary, making extensive notes of cabinet meetings under Heath. No other senior Conservative seems to have kept a diary during this government, so Hailsham's has a special significance, though the existence of the document is a little surprising given that he forcefully condemned

political diary-keeping in his memoir, *A Sparrow's Flight*, and stressed that nothing of the kind would be found in his papers after his death. Perhaps he saw the notes as something less than a diary, or intended to make a bonfire of them but failed to (thankfully).

Most of the entries are in 'Speedwriting', a phonetic system of abbreviation or word-contraction devised in the US in the mid-1920s, which he had learned as a young barrister and modified over the years (adding, for example, characters from classical Greek, such as θ - theta - for "th" sounds). Speedwriting is similar to shorthand, but was designed originally to be written using ordinary typewriters, so no special symbols needed to be learned. As a result it is quicker to master than true shorthand, but a good deal slower to write.

These notes are difficult to read, but rewarding as a source because the level of detail recorded is often considerable and Hailsham seems to have felt sufficiently sure of their unreadability to be relatively indiscreet. Deciphering has been made easier by the discovery of what codebreakers call a 'crib'. In 1985 Hailsham witnessed a fatal traffic accident on the M1: he made a quick *aide-mémoire* in speedwriting, then dictated a copy in plain English. We can reconstruct a good deal of his system by comparing these texts. We have also used Charles E. Smith's *Speedwriting dictionary* (New York, 1937 edition), which helps less than one might hope because Hailsham had customised the original system to such a degree that one present-day instructor of speedwriting we approached found his texts impossible to read reliably. (Also the dictonary translates English to speedhand, but not the other way about, making it difficult to use effectively.)

An early translated entry relates to the sudden resignation of James Chichester-Clark as Prime Minister of Northern Ireland in March 1971. The translation is not quite complete: some phrases prove elusive (marked in red; conjectured but uncertain readings are square bracketed in italics). Note that context mattered powerfully to speedwriting, because the same letter or combination of letters can represent many different meanings. Words are often contracted to a single letter and combinations of words can also be represented in radically shortened form. So, "w waw" might mean "which we all wanted", the letter 'w' stretched to three different meanings in the compass of only four characters.

Monday 22 March 1971: the resignation of Chichester-Clark

A second translated item relates to the painful events of 18 and 19 February 1972 when the Heath Government experienced defeat in its first, shattering collision with the National Union of Mineworkers (N.U.M), an episode which cast its shadow across British politics for more than a decade. On 9 January the N.U.M. had gone on strike, rapidly causing a rundown of coal stocks and severe power cuts to industry and homes. The government set up an inquiry into the union's claims chaired by a senior judge, Lord Wilberforce, and Hailsham records his impressions as the Cabinet first discussed his report. To the horror of ministers - who were "indecisive, divided" - the miners' executive had rejected the report, though Wilberforce had accepted their case for 'exceptional treatment' almost in full. The Cabinet debated whether to offer further concessions, but was swayed by the argument that they could hardly "bin Wilberforce with the ink scarcely dry" (as Carrington put it, in a decisive intervention), finally deciding that the Prime Minister

should meet the miners and urge them to ballot their members on the Wilberforce terms. Hanging over the argument was the fact that coal stocks actually at the power stations were at a very low level: only 14 days remained, after which generating capacity would fall at best to 25 per cent of that needed. Hailsham summed it all up with a single word: "Abyss".

Ministers were told to remain close by in case a further meeting was necessary, so a clutch of senior Tories adjourned to the Savoy Grill. As the diners worked their way through oysters and salmon - Hailsham scrupulously records that the white Burgundy was especially good, and that Carrington paid - the miners' leaders met the PM and inflicted the *coup de grâce*. Sensing the strength of their position, they pressed their demand for further substantial concessions, which they promptly got. Hailsham's text is not wholly clear, but it seems that he went home in the early hours of 19 February under the mistaken impression that Heath had faced the strikers down and forced them to settle within the terms of the report, aided by a mere facesaving device from the National Coal Board. Even this would have been far from a happy outcome from the government's point of view. "We have avoided a great evil," he wrote, "but Wilberforce is bad enough".

A few weeks later, on 7 March, the Cabinet debated the introduction of direct rule in Northern Ireland and the suspension - effectively abolition - of the Unionist-dominated Stormont Parliament. Hailsham spoke against, stressing the political risk to the Conservatives, and frankly admitted: "Not a very popular or polished performance on my part". A decision was deferred, but suspension came later in the month.

1974: THE END OF HEATH

A second miners' dispute in early 1974 caused Edward Heath to call an early General Election, which he failed to win. (A tantalising coded entry, as yet only partly translated, has Carrington making the case for an early dissolution privately to Hailsham.) No party held an outright majority and for a few days the possibility of a Conservative-Liberal arrangement was explored. Hailsham made extensive notes on meetings, mostly in plain English.

Interestingly, one entry shows that MT and Keith Joseph were among only three ministers openly opposed to approaching the Liberals when the Cabinet discussed the question on 1 March, making common cause even before the end of the Heath Government.

A further note gives an overview of the crisis over the weekend, illustrating how little prospect there was of a viable arrangement. Hailsham believed the outcome particularly damaging to the Liberals and anticipated that their six million strong vote would fall dramatically at the next election - which could not be far off - giving one or other of the major parties a strong majority. (He proved wrong in this judgement.)

Once again in Opposition, the Conservative Shadow Cabinet saw some sharp arguments over tactics, while emerging offstage were deeper divisions as to the overall direction of the party. Hailsham saw more of the former than the latter, recording early mentions of the idea that the Conservatives should run their next campaign promising a 'government of national unity', which they did when a second election came in October. Defeat followed, Labour winning a majority of three. At a Shadow Cabinet

discussion 12 days later, an element of recrimination is perhaps present, Hailsham pointing out to colleagues the cost of this stance in terms of party morale and cohesion.

A group of shadow ministers met quietly on 12 November - in Heath's room, but in their leader's absence - to discuss his future. Hailsham records a negative-sounding discussion, and reports a slur by Harold Macmillan on Keith Joseph, currently a hesitant candidate for the succession.

1975-79: THATCHER'S SHADOW

Hailsham was not particularly close to Heath, but nor was he an obvious supporter of Margaret Thatcher. He played no part in her election as leader in February 1975 (other than a ceremonial role at the party meeting which formally adopted her) and may not have expected to serve in her team. But he was a skilful courtier, writing her an amiable and a supportive letter of congratulation to which she warmly replied, in what proved to be the beginning of a lengthy correspondence across the years. For her part MT was naturally respectful of a figure who was so much her senior in the party hierarchy, and conscious also how limited her support was among the big names of the previous generation. And so Hailsham continued to sit in the Shadow Cabinet and his views had weight with the new leader.

Hailsham had more time for note-taking in Opposition and saw perhaps less need for secrecy, so speedwriting diary entries now decline in favour of longhand. He wrote a blow-by-blow account of a divisive Shadow Cabinet meeting on 11 April 1975 to discuss a paper by Keith Joseph. This single document is probably the closest surviving account of what it was actually like in the Thatcher Shadow Cabinet, opening with the words of Reggie Maudling: "I do NOT agree with ONE little bit". The dry formal minutes are worth comparing.

Keith Joseph is the subject of several later entries. In a conversation at All Souls in November 1976 Hailsham delivered a sarcastic put-down when Joseph lamented the loss of Enoch Powell to the Conservative Party: "I do not doubt Judas Iscariot was a great loss to the Church", he said - provoking laughter from another Fellow, Michael Ramsey (the Archbishop of Canterbury) - adding for good measure, "you wear too much sackcloth". This was a common criticism of Joseph in the late 1970s, as he agonised over the faults and failures of post-war Conservatism, impugning in the process the political record of colleagues like Hailsham.

Criticism of so close an ally of the leader of course implied doubts about her, and these duly surface in the diary at the end of March 1977 when Peter Carrington dropped by for a quiet chat.

For her part MT seems still have to had considerable trust in Hailsham's judgment. A few months earlier she consulted him in a very confidential matter, inviting him to her home in Flood Street - away from her staff and the press - to discuss an approach that had been made her by a dissident Labour MP, Brian Walden, "purporting to speak for 12". "If we would put down motion of censure he might vote with us". A revolt on this scale, on a motion of confidence, would have brought down the Labour Government and forced an early General Election.

Hailsham had an eye for a story. In January 1977 during a shooting weekend at Birkill in Fife he recorded an extraordinary anecdote by Alec

Douglas-Home of his time as Prime Minister.

In 1964 a group of Aberdeen University students simply walked up to the house where he was staying overnight - belonging to John Buchan's son and daughter-in-law, the Tweedsmuirs - and found him unguarded, indeed alone. The house was too small to accommodate his bodyguard, but it was judged a safe place and so the policeman was quartered elsewhere. The Prime Minister opened the door to the students in person, to be told that they had come to kidnap him. Characteristically cool, he played for time - asked for ten minutes to pack some things, offered them beer in the kitchen - and did his considerable best to talk them out of it. Eventually, when his hosts returned, the students were persuaded to abandon the attempt. It was in everyone's interest to say nothing more about it - the bodyguard's especially - and not a breath of the story reached the press, beyond a garbled account in the student newspaper. Thereafter Home was wise and generous enough to let the incident slip into oblivion, except as an after dinner story told against himself.

Aside from the IRA attacks on Margaret Thatcher and John Major, this was one of the worst breaches of the personal security of a British Prime Minister in the twentieth century (that we know of at least). It brings to mind the once famous incident in September 1913 when angry suffragettes cornered Asquith on the 17th Green at Lossiemouth. His daughter Violet fended them off with a golf club till detectives arrived. Though similar weapons were probably to hand at the Tweedsmuirs', Home's methods were subtler, and fortunately just as effective.

PLEASE HELP US TRANSLATE THE CODED DIARY

Most of the coded entries in the diary are untranslated and we would be delighted to have help reading more from people with the right skills.

Here are some coded diary extracts. We will be adding more as work gets underway.

To aid your work, try reading the Kryptos Society's notes on Lord Hailsham's system and their invaluable list of almost 800 word meanings ("recoveries") - this last is an Excel file and needs to be opened with that programme. There are also the site editor's notes, an admittedly skimpier production.

Email us for more information

The original of the diary, and a huge collection of other Hailsham papers, are now available to be seen in person at the Churchill Archive Centre, catalogued online.

IN DEFENCE OF JUDICIAL DISSENT

Abstract

Recently, the issue of the 'inefficient' practice of judicial dissent has become a matter of some controversy in Australia. Responding to this controversy, this article defends the role of dissent by developing a conceptual foundation to identify and understand the vital role it plays — through various mechanisms — in promoting the excellent performance of the judicial function. It then turns to an illustration of judicial excellence in dissent by reference to a paragon opinion which demonstrates that dissent is not a mere anachronism, but a vital tool in enhancing judicial performance.

I Introduction

Views of the dissenting judge vary greatly: the judge as noble juridical warrior, bravely resisting the misguided and dangerous mistakes of his or her peers; as curmudgeonly recalcitrant, ignoring the inevitable march of progress in law and society; as activist ideologue, abandoning the methods and constraints of office to promote a personal agenda; or as mere self-indulgent attention seeker. A strong and often emotive response of one form or another appears a common response to judicial dissent.

However, while individual dissents often attract attention, the *institution* of the dissenting judicial opinion is usually taken for granted as a feature of the common law judiciary.[1] Arguably, the 'priesthood' image of judging[2] continues to exert such force that much of juridical theory and practice remains under analysed.[3]

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* Senior Lecturer in Law at the University of South Australia, School of Law. This paper has evolved from the *Great Australian Dissent* Workshop, held at the Gilbert & Tobin Centre of Public Law of the University of New South Wales in June 2015. Collected papers from that workshop are available in Andrew Lynch (ed), *Great Australian Dissents* (Cambridge University Press, 2016). I would like to thank all of the participants of that workshop for the many invigorating debates that have shaped and informed this article.

1 John Alder, 'Dissents in Courts of Last Resort: Tragic Choices?' (2000) 20 *Oxford Journal of Legal Studies* 221.

2 David Pannick, *Judges* (Oxford University Press, 1987) 14.

3 See generally Joe McIntyre, *The Nature and Implications of the Judicial Function* (PhD Thesis, University of Cambridge, 2013) 2.

The judicial dissent is, though, something of an outlier — a *mere* opinion — lacking direct binding force or normative consequences. In a world of escalating emphasis on economic efficiency, where there is increasing pressure on judges to deliver 'justice' more quickly and with fewer resources,[4] a practice that does not directly resolve disputes nor articulate the law may appear superfluous and unnecessarily disruptive. A dissentient necessarily holds themselves apart from their peers, a rebuke to their judgement and reasoning. A dissent appears to undermine judicial collegiality, to corrode legal certainty and, perhaps most damningly, to lengthen the pages of already voluminous law reports.

Recently that relationship between dissent and judicial collegiality, collaboration and collective decision-making, has become a matter of some controversy in Australia following a spate of intellectual confrontations between leading judges over the matter. As his Honour approached retirement from the High Court of Australia, Justice Heydon, while in the United Kingdom, delivered an 'extraordinary'[5] speech on the threat to judicial independence posed by the internal pressure in courts to conform and collaborate in single judgments. When published on the eve of his Honour's retirement, in the *Law Quarterly Review* under the provocative title 'Threats to Judicial Independence: The Enemy Within',[6] the speech sparked a series of hostile articles by leading judges in Australia in response.

At its heart, the controversy reflects different conceptions of how judges should undertake their role and about the precise objectives judges should pursue. The issues of dissent and collective decision-making become a window into a deeper conflict about the nature, form and limits of the judicial role. These issues are too rarely the subject of direct consideration. Heydon's defence of the individualist judge challenges us to think about what ends dissent serves. In turn this demands that we reflect upon the underlying issues of judicial theory, as it is only by placing dissent in the broader framework of function, method, impartiality (independence) and accountability that it can properly be understood. Taken together, these ideas help us to understand the roles of dissent.

Of course, the separate dissent is essentially a creature of the common law, and the common law has long had a distrust of abstract theory. The common law method, with its emphasis on analogy, prefers pragmatism to principle, and tends to be dominated by parable and image rather than dry analysis. That predilection drives the methodology of this article. After a short theoretical analysis of the role of dissent, this article explores that role by examining a single dissenting opinion: the judgment of

4 Douglas Drummond, 'Towards a More Compliant Judiciary? — Part II' (2001) 75 *Australian Law Journal* 356, 357. Cf J J Spigelman, 'Judicial Accountability and Performance Indicators' (2002) 21 *Civil Justice Quarterly* 18, 20.

5 Andrew Lynch, 'Collective Decision-Making: The Current Australian Debate' (2015) 21 *European Journal of Current Legal Issues.*

6 J D Heydon, 'Threats to Judicial Independence: The Enemy Within' (2013) 129 *Law Quarterly Review* 205.

Bray CJ[7] of the South Australian Supreme Court in the case of *R v Brown* ('*Brown*').[8] The case concerned an allegation that Brown had, under duress, aided Morley in his killing of a woman by coughing aloud to disguise Morley's approach to the victim.[9] While a majority of the Court held that duress could never be a defence to a charge of murder, Bray CJ rejected the 'simple proposition that no type of duress can ever afford a defence to any type of complicity in murder'.[10]

It is important to pause at this point to explicitly explain why *this* dissent has been used to illustrate the role of dissent. While undoubtedly an example of good judge-craft, of the striving for a principled resolution in a field bereft of clear authority, it is unlikely to come to mind when one thinks of memorable or famous dissents. There is often an expectation that discussion of dissent should focus on the 'great' dissent, with greatness evidenced by the subsequent adoption of the substantive rule.[11] Readers will no doubt differ as to their nominee for mantle of best, greatest or most important dissent, perhaps favouring those soaring judgments of fiery and righteous rhetoric that 'appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed'.[12] Justice Harlan's dissent in *Plessy v Ferguson*,[13] resisting the 'separate but equal'[14] doctrine, stands foremost among such dissents in common law judicial history.[15] Such judgments perform a key social and political role,[16] and take on the mantle of greatness over time as the political values they embody come to dominate.[17] While the dissent in *Brown* has

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7 See generally John Emerson, *John Jefferson Bray: A Vigilant Life* (Monash University Publishing, 2015).

8 [1968] SASR 467.

9 Ibid 480.

10 Ibid 499.

11 Alan Barth, *Prophets with Honor: Great Dissents and Great Dissenters in the Supreme Court* (Knopf, 1974): considers the 'prophet' view of dissent; Thomas Healy, *The Great Dissent: How Oliver Wendell Holmes Changed His Mind — and Changed the History of Free Speech in America* (Picador, 2014); See, eg, A R Blackshield (ed), *The Judgments of Justice Lionel Murphy* (Primavera Press, 1986): alternatively, there may be a focus on the great dissenter.

12 Charles Evans Hughes, *The Supreme Court of the United States; Its Foundation, Methods, and Achievements: An Interpretation* (Columbia University Press, 1928) 66.

13 163 US 537, 552–64 (1896).

14 Ibid 552.

15 See Mathew P Bergman, 'Dissent in the Judicial Process: Discord in Service of Harmony' (1991) 68 *Denver University Law Review* 79, 82; See also *Lochner v New York*, 198 US 45, 74–6 (Holmes J) (1905); *Olmstead v United States* 277 US 438, 471–85 (Brandeis J) (1928); *Liversidge v Anderson* [1942] AC 206, 244 (Lord Atkin). See also *Granatino v Radmacher (formerly Granatino)* [2011] 1 AC 534, 575–595: consider Baroness Hale's dissent for a more recent example.

16 See Bergman, above n 15, 82–5.

17 Ibid 85: as Bergman notes, however, this process of adoption is, ultimately, a purely contingent process.

been influential in informing subsequent debate,[18] its use as an illustrative device is not justified by that reception.

Rather, the dissent in *Brown* has been chosen for its *juridical* quality, as opposed to its political or legal-normative impact, and is used here to illustrate the technical value of dissent above and beyond mere subsequent adoption. It is used as a concrete device to explore the general principle of why dissenting — as opposed to a particular dissent — matters. It is, arguably, the relative anonymity of the case that makes it an effective device in exploring the value of dissent. This case is not a cause célèbre. As a result, it allows the reader to approach the analysis without preconceived opinions, and to focus on the case in all its particularity. Indeed, it is precisely because I am — and hopefully the reader is — largely ambivalent to the substantive content that this device is effective. In a tradition that largely decries theory, this dissent is used as a concrete illustrative device to explore in some detail the various roles performed by dissent. In that sense, it is not a simple example of a famous *dissent*, but a means to explore the benefits of *dissenting*. Chief Justice Bray's dissent provides a concise and vivid illustration of not only *how* an excellent dissent can be delivered, but *why* such dissents are important.

This article outlines a conceptual framework for understanding the critical institutional roles of dissent and utilises Bray CJ's dissent to concretely illustrate the different aspects of that framework.

As resourcing for the justice system comes under pressure, arguments against dissent — including efficiency, collegiality and simplicity — mount, as often from the bench as from beyond. If, in light of such criticisms, the published judicial dissent is to be something other than an institutional artefact, and if it is to remain a vital practice, then it is necessary to outline positively the worth of the dissent to the performance of the judicial function. This article aims to explain and illustrate both.

II An 'Enemy Within' — Dissent on Dissent in Australia

By the time that Justice Heydon first delivered the 'Enemy Within' speech to the Cambridge Law Faculty in January 2012,[19] his Honour's eyes were already shifting to the legacy he would leave upon retirement the following year. It seemed clear that this legacy would not involve the reinvigorated traditional formalism which, for a time, seemed likely with his appointment. That appointment had been preceded months

18 See *DPP (Northern Ireland) v Lynch* [1975] AC 653: in particular, the use of *Brown* in this case, discussed below.

19 Heydon, 'Enemy Within', above n 6. The lecture was delivered on 23 January 2012 at the Cambridge Law Faculty and later that evening at the Inner Temple, on 24 January 2012 at the Oxford Law Faculty, and on 26 January 2012 at Herbert Smith & Co.

earlier by an '(in)famous'[20] speech delivered by Justice Heydon entitled 'Judicial Activism and the Death of the Rule of Law'.[21] Decried as effectively a 'job application',[22] the speech harshly criticised the activist 'hero judge' who undermined the rule of law by relying on 'individual judicial whim'[23] rather than strict legal reasoning. In an approach attractive to the conservative Howard Government, Justice Heydon advocated a return to legalism, lambasting the approach of the Mason and Brennan High Courts.[24]

For a time, it appeared that the vision for the Court of Justice Heydon would hold sway, with his appointment heralding 'a change in the Court's jurisprudential and methodological trajectory back to the traditional formalism that he so revered.'[25] Justice Heydon sat at the 'centre'[26] of the High Court, forming a powerful block of like-minded Justices. In the first three years following his Honour's appointment, Heydon J dissented, on average, in less than eight per cent of cases.[27]

However, this apparent consensus of approach was not enduring. With changes to the composition of the Court, Justice Heydon increasingly found his role as central collaborator a receding memory. The turning point was arguably the decision in *Roach v Electoral Commissioner*,[28] where the majority adopted an expansive interpretation to the implied freedom of political communication. To Heydon J's consternation his

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20 Gabrielle Appleby and Heather Roberts, 'He Who Would Not Be Muzzled: Justice Heydon's Last Dissent in *Monis v The Queen* (2013)' in Andrew Lynch (ed), *Great Australian Dissents* (Cambridge University Press, 2016) 335, 342.

21 J D Heydon 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Australian Bar Review* 110; (2003) 47 *Quadrant* 9; (2003) 14 *Australian Intellectual Property Journal* 78; (2003) 10 *Otago Law Review* 493.

22 Benjamin Haslem, 'Gaudron Vacancy Activates Lobbying', *The Australian* (Sydney), 4 December 2002, 5; Appleby and Roberts, above n 20, 342–3: discusses the conservative political context of the speech.

23 Heydon, 'Judicial Activism', above n 21, 119. Heydon borrows the term 'hero judge' from John Gava, 'The Rise of the Hero Judge' (2001) 24 *University of New South Wales Law Journal* 747.

24 See generally Heydon, 'Judicial Activism', above n 21, 116.

25 Appleby and Roberts, above n 20, 343.

26 Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2004 Statistics' (2005) 28 *University of New South Wales Law Journal* 14, 28.

27 Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2003 Statistics' (2004) 27 *University of New South Wales Law Journal* 88, 93: specifically, he dissented in 7 per cent of cases in 2003; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2004 Statistics' (2005) 28 *University of New South Wales Law Journal* 14, 19: 8 per cent of cases in 2004; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2005 Statistics' (2006) 29 *University of New South Wales Law Journal* 182, 190: 8 per cent of cases again in 2005.

28 (2007) 233 CLR 162.

Honour found himself dissenting from what he saw as a radical approach to constitutional interpretation.[29]

By 2009, following the retirement of Justice Kirby, Justice Heydon found himself as the most frequent dissenter on the Court.[30] In the following three years his Honour's rate of dissent skyrocketed; 15 per cent in 2010,[31] 45 per cent in 2011,[32] and 44 per cent in 2012.[33] During this period, his anger at the interpretative techniques of his colleagues became palpable.[34] Notably, and in a 'striking'[35] example of individualism, Justice Heydon did not join with *any* other judge in 2012, evidencing 'a complete lack of co-authorship … never observed before'[36] in the modern judicial statistics. Perhaps the starkest illustration of Heydon J's isolation is seen in a series of cases where his Honour commenced his judgment with the 'pugnacious and irrefutably terse statement'[37]: 'I dissent.'[38] In each of these cases, Heydon J was the lone voice in dissent, and criticised not only the substantive conclusion, but the process of legal reasoning deployed by the majority. By the time of his Honour's final judgment, Justice Heydon had 'established a reputation for being a lone and curmudgeonly dissenting voice on the High Court.'[39]

It was against this backdrop of increasing isolation that Justice Heydon delivered his 'Enemy Within' speech. In what was widely seen as a parting shot across the bows of his Honour's contemporaries,[40] Justice Heydon argued that the increasing pressure within courts to produce single majority judgments was becoming a 'most

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29 Ibid 224–5 [181] (Heydon J).

30 Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2009 Statistics' (2010) 33 *University of New South Wales Law Journal* 267, 276, 278.

31 Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2010 Statistics' (2011) 34 *University of New South Wales Law Journal* 1030, 1039.

32 Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2011 Statistics' (2012) 35 *University of New South Wales Law Journal* 846, 855.

33 Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2012 Statistics' (2013) 36 *University of New South Wales Law Journal* 514, 522.

34 James Allan, 'The Three Rs of Recent Australian Judicial Activism: Roach, Rowe and (No)'riginalism' (2012) 36 *Melbourne University Law Review* 744, 776, citing *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 97–9 [292]–[302] (Heydon J).

35 Ibid 526.

36 Ibid.

37 Appleby and Roberts, above n 20, 346.

38 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 134 [396]; *South Australia v Totani* (2010) 242 CLR 1, 93 [238]; *Williams v Commonwealth* (2012) 248 CLR 156, 282 [291].

39 Appleby and Roberts, above n 20, 335.

40 Heydon, 'Enemy Within', above n 6: Heydon's caveat, set out at the start of his article, that he 'must not be taken to be speaking about the actual behaviour of any particular court of which the author has been a member'; Lynch, above n 5, 4: described this generously as 'faintly incredible'.

insidious' threat to judicial independence.[41] In a 'sustained reflection'[42] on the internal dynamics of appellate courts, Justice Heydon ranged beyond the issue of dissent to explore issues of concurrent judgments and the discipline of judgment writing, examining issues of independence, transparency and judicial quality.

The 'Enemy Within', unsurprisingly perhaps, provoked a string of responses including from sitting and former High Court Justices.[43] Sir Anthony Mason, for example, challenged the magnitude of the threat posed by either dominating judges or 'herd-like' complicit judges,[44] though he accepted that the preference for joint judgments waxes and wanes with the personalities of judges on the bench.[45] Heery sought to downplay the benefits Heydon attributed to *writing* judgments and denied the empirical sustainability of Heydon's position.[46] Justice Kiefel responded by extolling the virtues of joint judgments, principally in terms of efficiency of court time and gains for legal certainty.[47] Justice Gageler took the article as an opportunity to address the deeper issue of why a judge should write judgments. Justice Gageler highlighted the benefits, in terms of quality of decision-making, of allowing each judge to go through the rigours of writing.[48]

Each of the articles picked up and responded to a different aspect of Heydon's article. There are differences of emphasis and of purpose, and conversations sliding past each other. This is unsurprising. Discussing dissent, concurrence or joint judgment unavoidably involves some engagement with questions of why *any* judgment should be written, or published, which feeds into questions of what a judgment is trying to achieve and how. Beneath this lay largely unarticulated foundational ideas of the nature of the judicial function, and how it can be performed, promoted and protected. And away lurking in the corner, in the dark shadows of terms like 'certainty' and 'predictability', are half-glimpsed and under-examined conceptions of law. This heady mix is beguiling and contested, and it is little wonder that it is a struggle to pin down the 'core' role of dissent.

Nevertheless, the broader, collective debate has undoubtedly created a renewed focus in Australia on judicial decision writing in general, and on the judicial dissent in

41 Heydon, 'Enemy Within', above n 6, 222.

42 Lynch, above n 5, 4.

43 See Sir Anthony Mason, 'Reflections on the High Court: Its Judges and Judgments' (2013) 37 *Australian Bar Review* 102; Peter Heerey, 'The Judicial Herd: Seduced by Suave Glittering Phrases?' (2013) 87 *Australian Law Journal* 460; Justice Stephen Gageler, 'Why Write Judgments?' (2014) 36 *Sydney Law Review* 189; Justice Susan Kiefel, 'The Individual Judge' (2014) 88 *Australian Law Journal* 554.

44 Mason, above n 43, 108–9.

45 Ibid 103–8.

46 Heerey, above n 43, 463.

47 Kiefel, above n 43, 556.

48 Gageler, above n 43, 201–3: in doing so Justice Gageler evoked the seminal article of Sir Frank Kitto, 'Why Write Judgments?' (1992) 66 *Australian Law Journal* 787.

particular. The underlying concerns are not, however, confined in any way to Australia. Courts are under increasing pressure, with tightening budgetary demands and calls for 'efficiency', in order to produce 'more' resolutions with fewer resources.[49] All the while, litigation rates are falling while costs spiral. In such a context, dissent looks like a structural inefficiency, an anachronism from another era. Dissent appears to import redundancy into an overstrained system. Is it not better, surely, that judges produce a single concurrent judgment — fewer hours to prepare, fewer pages to read? Should not multiple judges, carefully crafting a single judgment, stand a better chance of approaching the 'ideal' judicial resolution of the dispute? Even posing such questions immediately challenges us to consider what 'efficiency' might mean in a judicial context, whether 'ideal' is a meaningful standard, and precisely what it is we are asking judges to achieve through the published judicial judgment. Underlying the 'Enemy Within' debates is a profound disagreement as to the scope of the judicial rule. The issue of judicial dissent, then, becomes a window through which to view these issues of function, role and method.

III Approaches to Understanding Dissent

The movement of Justice Heydon from the centre of the Court to the isolated periphery no doubt represented a (current) rejection of his Honour's conception of judicial decision-making methodology. The debate as to whether there is, or should be, any pressure on judges to concur in a single judgment exposes, however, deeper debates as to why we have written judgments at all, and why independence and impartiality matter (and what form they take).

In his article, Heydon champions a view of dissent that enables judges to perform their role without the pressure of having to 'submit themselves to a process designed to produce an artificial unanimity.'[50] This echoes a similar contempt for unanimity expressed by Thomas Jefferson of the Marshall Court's practice of 'unanimous holdings as: "An opinion … huddled up in a conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lax or timid associates, by a crafty chief judge, who sophisticates the law to his own mind, by the turn of his own reasoning."'[51]

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49 Productivity Commission, 'Report on Government Services 2016' (Report, 2016) 7.34–7.48 <http://www.pc.gov.au/research/ongoing/report-on-government-services/2016/justice/courts/rogs-2016-volumec-chapter7.pdf>: includes a report on the 'efficiency' of Australian courts in terms of 'clearance rates', judges per 100 finalisations and cost per finalisation.

50 Andrew Lynch, 'Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia' (2003) 27 *Melbourne University Law Review* 724, 738; Heydon, 'Enemy Within', above n 6, 216–17.

51 Bergman, above n 15, 81 quoting Letter from Thomas Jefferson to Thomas Ritchie (December 25, 1820).

This image speaks to a form of judicial practice intuitively and intensively repulsive. The practice of dissent becomes instantly attractive in juxtaposition. Reflecting upon this image grants us some insight into why dissents matter, and indeed what makes a good dissent. While it is likely, as Sir Anthony Mason observes,[52] that Heydon overplays the prevalence of 'herd-like' tendencies in the modern Australian judiciary, the image presented by Jefferson and echoed by Heydon alludes to the values of discipline, intellectual honesty, integrity and courage we wish our judges to aspire to. It seems clear that where the pursuit of such ideals demands a judge dissent, it is proper that they do so, even — and especially — in the face of pressure to conform. If dissent exists only as a symbolic embodiment of such values of judicial excellence, as a signifier of integrity,[53] it would serve an important institutional role.

There are, of course, many other roles ascribed to judicial dissent: dissent as prophecy for the law;[54] as embodying a democratic ideal;[55] as an institutional form of civil disobedience;[56] as safety mechanism against majority error;[57] as a spur within the court to greater quality in decision-making;[58] as clarifier of law[59] and as a lever by which to undermine decisions.[60] In each case, however, the true value of dissent is in its relationship to often unspoken underlying values. Dissent takes on an instrumental role in the pursuit of legal clarity and certainty, juridical accuracy and quality, and perhaps, democratic ideals. As was evident in the 'Enemy Within' debates, failure to properly examine these underlying issues often sees the authors talking past one another in a way that clouds the disagreements over the proper role and scope of dissent.

Unfortunately, the understanding of dissent is hampered by the fact that the dissenting opinion is usually taken for granted as a feature of the common law judiciary.[61] Discussions of judicial practices such as dissent and intra-court dynamics fall uneasily

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52 Mason, above n 43, 108–9.

53 Justice Michael Kirby, 'Judicial Dissent: Common Law and Civil Law Traditions' (2007) 123 *Law Quarterly Review* 379, 381; Lynch, above n 50, 725.

54 Barth, above n 11; Benjamin Cardozo, *Law and Literature and Other Essays and Addresses* (Harcourt, Brace & Co, 1931) 36; See also J Louis Campbell, 'The Spirit of Dissent' (1983) 66 *Judicature* 305, 311.

55 William O Douglas, 'The Dissent: A Safeguard on Democracy' (1948) 32 *Journal of the American Judicature Society* 104, 105; Alder, above n 1, 222.

56 Campbell, above n 54, 306.

57 Kirby, 'Judicial Dissent', above n 53, 397.

58 William J Brennan Jr, 'In Defence of Dissents' (1986) 37 *Hastings Law Journal* 427, 430; Lynch, above n 50, 740.

59 Bergman, above n 15, 85: a dissent 'spotlights the reasoning utilised by the court by articulating the logically opposite legal principle' in a way that can clarify and strengthens the majority decision. See also Roscoe Pound, '*Cacoethes Dissentiendi*: The Heated Judicial Dissent' (1953) 39 *American Bar Association Journal* 794, 795.

60 Brennan, above n 58, 430.

61 Alder, above n 1, 221.

within broader paradigms of jurisprudence, constitutional or administrative law, and do not tend to attract sustained academic analysis. It is perhaps unsurprising then, that there has been 'little discussion'[62] and 'limited effort'[63] to systematically reflect upon and delimit the role of dissent in judicial decision-making. There have been notable exceptions, including contributions by Bergman,[64] Lynch,[65] Justice Kirby[66] and Alder,[67] each of whom attempt, in various ways, to set out and explore the various roles performed by judicial dissents.

Alder, for example, identifies two broad kinds of argument in favour of dissents: one related to the substance of a dissent 'as a way of identifying and protecting incommensurable values' and the second concerning 'the practice of dissent as a quality control and safety valve.'[68] From these arguments he derives five key functions performed by judicial dissent, namely:

1 to help ensure that all members of the panel are treated equally, with no point of view suppressed;[69]

2 to strengthen public confidence in the judiciary by sharpening the reasoning of the majority, ensuring that decisions are fully considered and that individual decision makers are accountable;[70]

3 to embody the traditional values of freedom of expression and conscience as of intrinsic value;[71]

4 to expose weaknesses in the legal proposition of the majority;[72] and

5 to focus and clarify our understanding of the issues.[73]

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62 Ibid.

63 Lynch, above n 50, 724.

64 Bergman, above n 15.

65 Lynch, above n 50. See also Andrew Lynch, 'Is Judicial Dissent Constitutionally Protected?' (2004) 14 *Macquarie Law Journal* 81.

66 Kirby, 'Judicial Dissent', above n 53. See also Justice Michael Kirby, 'Appellate Courts and Dissent: Diversity in the Protection of Freedom' (2004) 16 *Judicial Officers Bulletin* 25; Justice Michael Kirby, 'Judicial Dissent' (2005) 12 *James Cook University Law Journal* 4.

67 Alder, above n 1.

68 Ibid 240.

69 Ibid.

70 Ibid.

71 Ibid.

72 Ibid 241.

73 Ibid.

Similarly, Lynch sees judicial dissent as serving three crucial functions: first, ensuring the judiciary 'enjoys certain key capabilities associated with a society governed in accordance with democratic principles and values'; secondly, enhancing the process of adjudication by stimulating clearer judgment writing, clarifying the majority views 'by throwing them into sharper relief' in a way that 'speaks to the integrity' of the process, and the independence of the judiciary; and thirdly, helping, over time, to develop and advance the law.[74]

This listing of functions of dissent by Alder, Lynch and others does help us to understand what a dissent can do. However, without explaining the relationships between these roles, or the hierarchies and potential for conflict between them, such listing of roles leaves substantial space through which the practice of dissent can be challenged by those unimpressed with these functions.

For example, it has been suggested that there 'remains a bias in the legal community against dissent',[75] based upon a perception that dissent undermines legal certainty[76] and diminish the authority of the court.[77] Dissents are seen as potentially undermining judicial independence[78] and collegiality,[79] and have been criticised as being nothing more than an act of judicial 'self-indulgence'[80] and 'self-publicity' at public expense.[81]

There remains genuine disagreement, not only as to the precise benefits offered by the dissent, but also as to the costs inherent in them. Are the institutional benefits of openness and accountability gained through dissent outweighed by the loss of collegiality, additional resources and potential reduction of legal certainty? Is the judgment of the court, as a whole, weakened or strengthened by the presence of a dissent? It is not possible to answer effectively these questions by collating the different roles performed by dissent, or the potential costs imposed by them. Rather, to understand why dissent matters, it is necessary to place the various roles performed by dissent into a broader framework, thereby providing a structured foundation for the analysis of dissent.

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74 Lynch, above n 50, 725–6, 737.

75 Campbell, above n 54, 305.

76 Alder, above n 1, 242; Kirby, 'Judicial Dissent', above n 53, 381; Robert Post, 'The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decision making in the Taft Court' (2001) 85 *Minnesota Law Review* 1267, 1311.

77 Alder, above n 1, 235. See, eg, Brennan, above n 58, 429 quoting Learned Hand, *The Bill of Rights* (Harvard University Press, 1958) 72: Learned Hand complained that a dissenting opinion 'cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends'.

78 Alder, above n 1, 243.

79 Brennan, above n 58, 429.

80 Kirby, 'Judicial Dissent', above n 53, 381.

81 Alder, above n 1, 243.

IV Towards a Theory of Dissent: Dissent and the Nature of the Judicial Function

That foundation can be provided by developing a clear articulation of the nature of the judicial function. That articulation of function guides not only the understanding of the role of dissent, but provides some measure by which to judge the quality of a dissent: a good dissent must further the excellent performance of the judicial function.

Too often the reason that debates over whether a given dissent is detrimental, distracting, useful or, indeed, great, flounder is that there is little agreement as to the criteria by which a dissent, or indeed a judgment generally, may be judged. This foundational task of articulating what makes any effective judgment often founders itself on unarticulated conceptions of the judicial function. By explicitly articulating what a judge is, or ought to be, striving for in delivering a judgment — that is, understanding the nature of the judicial function — it becomes possible to understand more coherently the role of dissent in that process.

Unfortunately, while there is a strong intuitive understanding of the judicial function, there is no canonically accepted statement of it. Moreover, it is beyond the scope of this article to provide an extensive examination of the nature of the judicial function.[82] It suffices, for present purposes, to note that the judicial function has two core, inter-related aspects; first, dispute-resolution and secondly, social (normative) governance. The resolution of disputes is clearly at the heart of the judicial function. As Shapiro notes, everyone 'seems to agree that conflict resolution is a basic task of courts.'[83] Judicial decisions are a particular type of institutionalised third-party, merit-based resolution, conforming to a particular method and process.[84] However, courts are not 'simply a publicly funded dispute-resolution centre',[85] but core institutions of governance. Judicial decisions not only resolve disputes, but constitute acts of normative governance; each judicial decision impacts the legal norms it applies. This second role of courts as 'instruments of social regulation'[86] flows from

82 See generally McIntyre, above n 3: for an extensive discussion of this topic, and its impact upon issues of judicial theory and practice.

83 Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press, 1981) 17.

84 Louis L Jaffe, *English and American Judges as Lawmakers* (Clarendon Press, 1969) 12: this method is deeply familiar. As Jaffe observes, it involves the 'unqualified application of the known law to facts fairly found'. Cf Sir Anthony Mason, 'The Role of the Judge at the Turn of the Century' in Geoffrey Lindell (ed), *The Mason Papers* (Federation Press, 2007) 46, 51: Mason argues that the judicial function simply requires the judge 'to resolve cases by applying the law to the facts as found'; *R v Deputy Industrial Injuries Commissioner; ex parte Moore* [1965] 1 QB 456, 488: thus the judge who spins a coin or consults an astrologer meaningfully ceases to be a judge.

85 Spigelman, above n 4, 26.

86 Sir Francis Gerald Brennan, 'Judging the Judges' (1979) 53 *Australian Law Journal* 767, 768.

the rational, reasoned and public resolution of disputes. The effect of each decision radiates beyond the particular dispute to vitalise, clarify and develop the law, balancing interests of responsive flexibility and justice with concerns for certainty and predictability.

The judicial function places the judge in an unavoidable place of tension; dispute-resolution demands finality and a focus upon the individual litigants, whereas governance demands the pursuit of responsive correctness, focusing on broader social interests and the generalised maintenance of legal norms. Moreover, different judges will legitimately differ not only as to the proper governance objectives to be pursued through decisions, but also as to the best means of achieving those ends. As these genuine tensions are inherent in the role, it is unavoidable that there will be disagreement over the balancing of incommensurable values making it 'impossible that bodies of men should always be brought to think alike'.[87] The *fact* of dissension is an unavoidable aspect of the judicial role.

However, the *publication* of a dissenting judgment must be justified. Dissent must either directly further the attainment of these two aspects of the judicial function, or indirectly promote and encourage such attainment. In the latter aspect, the dissent should be understood as a mechanism of judicial accountability.

Broadly understood, judicial accountability is a limited, functional or instrumental concept[88] that operates to promote the excellent performance of the judicial function.[89] It is concerned with promoting the judicial function by maintaining both the actuality of, and reputation for, integrity. These 'internal' and 'external' elements of accountability respond to different aspects of that concept.[90] The internal, 'subjective' or 'personal', aspect of judicial accountability is directed towards the individual judge, developing a personal and professional imperative to actually 'do the right thing'. It depends upon the personal integrity of the judge to *actually* adhere to judicial method and pursue excellence. In contrast, the external, 'objective' or

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87 *Grindley v Barker* (1798) 1 Bos & P 229, 238; 126 ER 875, 880 (Eyre CJ).

88 Charles Gardner Geyh, 'Rescuing Judicial Accountability from the Realm of Political Rhetoric' (2006) 56 *Case Western Reserve Law Review* 911, 916; Susan Bandes, 'Judging, Politics, and Accountability: A Reply to Charles Geyh' (2006) 56 *Case Western Reserve Law Review* 947.

89 Joe McIntyre, 'Evaluating Judicial Performance Evaluation: A Conceptual Analysis' (2014) 4 *Oñati Socio-legal Series* 898, 905–8: the

> mechanisms of judicial accountability [can be understood as] operat[ing] to promote the optimal performance of the judicial function, motivating the judge to adhere to the judicial decision-making method, maintain impartiality, avoid the abuse of office, and strive for excellence.

See also Elizabeth Handsley, 'Issues Paper on Judicial Accountability' (2001) 10 *Journal of Judicial Administration* 180, 218.

90 McIntyre, above n 3, 141–4. See also David Pimentel, 'Reframing the Independence v Accountability Debate: Defining Judicial Structure in Light of Judge's Courage and Integrity' (2009) 57 *Cleveland State Law Review* 1, 16–17.

'structural', aspect of judicial accountability is directed to the creation and maintenance of an institutional *reputation* for integrity. This complements the *actual* integrity of personal accountability, ensuring that judges both *act* with integrity and *appear* to do so.[91] The institutional reputation for integrity, quality and impartiality is critical to found the social legitimacy upon which both the dispute-resolution and social governance aspects of the judicial function depend.[92] Mechanisms of judicial accountability may promote the excellent performance of the judicial function by furthering either or both of the internal and external aspects of accountability.

A *The Roles of the Published Dissent*

The publication of dissents contributes both directly and indirectly to the excellent performance of the judicial function. Firstly, dissent, like all judicial reason-giving, can have a profound direct impact upon the proper performance of the judicial function.[93] By persuading the parties that their positions have been considered, reasons promote finality in resolution.[94] A dissent reassures the losing party that their view has been heard;[95] that at least one judge agreed with them. This not only aids the losing party in assessing whether to appeal, but it helps them come to terms with the decision, be comforted by the fact that their position was considered, and contributes to the overall judicial resolution of the underlying dispute.

Secondly, all reasons have a role in providing effective normative guidance.[96] Dissents do not have the immediate *stare decisis* status of the majority decision, but nevertheless have profound and direct normative impact. In shining a spotlight on the reasoning of the majority,[97] the dissent provides a tighter triangulation of the current state of the law. Moreover, as law is a system in motion, dissents can assist in predicting where the law may go. This is particularly so where there is disagreement of incommensurable values, for which there is 'no reason to assume that a majority is more likely to be right than a minority in relation to a value judgment'.[98]

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91 *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259: this need for institutional legitimacy reflect that oft cited aphorism that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'.

92 Nihal Jayawickrama, 'Combating Judicial Corruption' (2002) 28 *Commonwealth Law Bulletin* 561, 563: both aspects of the foundational judicial function demand an institutional reputation for judicial integrity; David C Brody, 'The Use of Judicial Performance Evaluation to Enhance Judicial Accountability' (2008) 86 *Denver University Law Review* 115, 125.

93 Murray Gleeson, 'Judicial Accountability' (1995) 2 *The Judicial Review* 117, 122.

94 Chaim Perelman, *Justice, Law and Argument: Essays on Moral and Legal Reasoning* (Reidel Publishing, 1980) 143.

95 Campbell, above n 54, 308; Alder, above n 1, 242; Kirby, 'Judicial Dissent', above n 53, 393.

96 Gleeson, above n 93, 122; Handsley, above n 89, 191: the obligation to give reasons can promote the general acceptability of judicial decisions.

97 Bergman, above n 15, 85.

98 Alder, above n 1, 222.

A dissent *may* 'weaken' the majority position, but may also strengthen the law by enriching the legal 'marketplace of ideas',[99] keeping 'alive choices for the future'[100] and acting as a 'beacon' for future developments.[101] To deny this normative role in the name of 'legal certainty' is to adopt a jaundiced and anachronistic conception of law. The publication of a dissent can directly contribute to the excellent performance of the judicial function by helping to resolve more fully and finally the underlying dispute, and to provide more effective normative governance.

Thirdly, published dissents like the obligation to provide reasons more generally, can operate as a powerful mechanism of judicial accountability, giving substance to the principle of open justice and enhancing both the internal and external aspects of judicial accountability.[102] A dissent not only exposes the reasoning of the dissentient to scrutiny and criticism 'by litigants, colleagues, the media and scholars',[103] but also intensifies such scrutiny in respect of the decision of the majority. This scrutiny and potential for critique not only acts as a powerful incentive to avoid 'judicial autocracy' and 'the arbitrary exercise of judicial power',[104] but as an effective stimulant in the avoidance of error and the attainment of judicial excellence and integrity.[105] The often anguished self-reflection and self-examination central to good decision-making are amplified by the requirement to publish reasons.[106] This takes on greater intensity for the dissentient, who is necessarily vulnerable and exposed in a way the majority is not. Dissents become a spur for quality decision-making for all judges involved 'forcing the prevailing side to deal with the hardest questions urged by the losing side.'[107] By encouraging reflection and care by both the majority and minority, dissents promote judicial integrity and diligence, they are thus a powerful tool of internal accountability. Dissents promote public confidence in such integrity and diligence, operating as a powerful tool of external accountability. While a dissent may air 'the court's dirty laundry before the public'[108] the reputation for integrity is far more important than any reputation for infallibility.[109] As Bergman notes, while dissenting opinions 'may destroy illusions of judicial inviolability, they provide

99 Brennan, above n 58, 433.

100 Alder, above n 1, 224.

101 Kirby 'Judicial Dissent', above n 53, 393.

102 Justice Michael Kirby, 'Judicial Accountability in Australia' (2003) 6 *Legal Ethics* 41, 46: in addition to these direct accountability consequences, reasons can facilitate review of the decision on appeal; Andrew Le Sueur, 'Developing Mechanisms for Judicial Accountability in the UK' (2004) 24 *Legal Studies* 73, 90: reasons also make 'transparent the different views held by members of the court'.

103 Kirby, 'Judicial Accountability', above n 102, 46. See also Kitto, above n 48, 382.

104 Kirby, 'Judicial Accountability', above n 102, 46.

105 Kitto, above n 48, 790.

106 Ibid 791–2.

107 Brennan, above n 58, 430; See also Lynch, above n 50, 740.

108 Bergman, above n 15, 87.

109 Kirby, 'Judicial Dissent', above n 53, 394: Justice Kirby rightly notes that today 'infallibility is denied to any human institution'.

assurance to the public that judicial decisions are not perfunctory.'[110] Moreover, dissents force the individual judge into the public sphere, allowing personal scrutiny of the quality of their work and the integrity of their conduct. It is for these reasons that Justice Kirby J describes the dissent as 'the most precious indication of the integrity, transparency and accountability of the work of the judicial branch of government'.[111] The dissent remains, at least in the common law world, one of the most powerful mechanisms of internal and external accountability.

Dissent, then, becomes an effective means of furthering both dispute-resolution and normative governance aspects of the judicial function. This instrumental conception of dissent not only guides the reconciliation of the various roles performed by dissent, but allows an assessment of the quality of a dissent. The excellent dissent is one that demonstrates judicial integrity and quality judge-craft in a manner that furthers the performance of the dispute-resolution and normative governance aspects of the judicial function, both directly and indirectly. Such a dissent must be conscious of the limitations that minority status brings, and of the institutional costs of the dissent, for like all accountability mechanisms, dissents are limited by their functional nature. Nevertheless, within those boundaries an excellent dissent must be bold, persuasive and fearless. Such a dissent will enhance both the law and the reputation of the court for it having been given.

The focus on what might constitute an excellent dissent is useful in understanding dissent more generally, providing a concrete and clear examination of the role of dissent not achievable by mere theoretical articulation. This is particularly so in the broader common law context. The common law method is of stories told and explored, not of abstract thought and cold theory. In such a context, the exposition of a paragon of excellence in dissent can help to illustrate, in a particularly vivid and accessible manner, why dissent matters.

V A Paragon of Dissent: Form, Substance and Style

The decision in *Brown* — in both its form and substance — provides just such a paragon. The appellants were convicted over the murder of one Elise Leggett, in whose house Brown and his wife lived as lodgers.[112] Morley had attempted to smother Mrs Leggett with a pillow as she slept, before repeatedly stabbing her with a knife. Brown was allegedly a party to an arrangement to kill Mrs Leggett, and aided Morley in that enterprise. Morley raised a defence of insanity, while Brown claimed that he acted under duress, compelled by the threats of Morley.

The appeals were heard jointly. Because of a quirk in the *Criminal Law Consolidation Act 1935* (SA) as it stood at the time (though subsequently amended), this joinder provides a unique insight into the judicial appreciation of the limits and role of the

110 Bergman, above n 15, 88.

111 Kirby, 'Judicial Dissent', above n 53, 381.

112 *Brown* [1968] SASR 467, 468.

dissenting judgment. Section 349(2) of that Act required that the decision in criminal appeals shall be delivered in single, joint judgment of the Court, unless the Court held it to be appropriate to provide separate judgments.[113] The effect of the provision was to demand judicial reflection upon both the need and cost of dissenting, ensuring that any dissent emerged only by deliberate election and presumably after some internal advocacy. Such a presumption against dissenting opinions required something more than mere disagreement; it demanded some particular intensity in the divergence of views so as to justify the pronouncement of separate judgments. By its form, this case illustrates this distinction, with a very different approach being taken for the two appeals.

A *The Facts of Brown*

The relationship between Brown and Morley was nasty, brutish and short. They met on the Saturday, and spend most of the day together. On the Sunday morning Morley came to Brown's house. In the early afternoon, Morley suggested '"knocking off" Mrs Leggett'.[114] When Brown refused, Morley threatened to harm Brown's wife before drawing a carving knife, placing it against Brown's throat and ordering him to do as he said or suffer the same fate.[115] The men began playing cards, with Morley decreeing that the loser had to kill Mrs Leggett.[116] Brown lost. Morley instructed him to put 'Ratsac' in Mrs Leggett's coffee.[117] Brown complied, though put in only a quarter of a teaspoon which was, and which he knew to be, harmless. Mrs Leggett drank the coffee with no ill effects. Eventually, Morley left and Brown went to bed.[118] However, an hour later Morley returned, woke Brown, and told him he was going to 'knock off' Mrs Leggett. When Brown protested, Morley threatened him, telling him that if he did not join in he would kill Brown's wife and parents. After half an hour of argument and threats, Morley, who had previously spoken of suffocating Mrs Leggett, picked up a pillow and ordered Brown to cough to cover the sound of Morley's movements. Brown began coughing and Morley left.[119] Gurgling noises

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113 That section was incorporated into South Australian law in the *Criminal Appeal Act 1924* (SA) s 4(2), which largely mirrored a similar provision in the original *Criminal Appeal Act 1907* (UK) 7 Edw VII, c 23, ss 1(4)–(5). *Senior Courts Act 1981* (UK) s 59: the general prohibition on separate judgments continues to apply to the UK Court of Appeal Criminal division. *R v Howe* [1987] AC 417, 438 ('*Howe*'); *Peters v The Queen* (1997) 192 CLR 493, 556; Alder, above n 1, 242; Kirby, 'Judicial Dissent', above n 53, 392: it has been suggested that single, joint judgments are desirable in all criminal appeal matters and this approach was justified by the particular need for certainty in criminal law cases and on the basis of not wanting to disappoint an accused who found that at least one judge supported him.

114 *Brown* [1968] SASR 467, 480.

115 Ibid.

116 Ibid.

117 Ibid.

118 Ibid.

119 Ibid.

were heard before Morley returned, covered in blood, having attempted to suffocate, then proceeded to stab Mrs Leggett to death.

On Brown's evidence, he believed that, at all times following the initial threat, Morley was armed, willing and able to attack both Brown and his wife. While the majority were sceptical of the 'inherent weaknesses'[120] of this version of events, they nevertheless recognised the right of the jury to be instructed as to its legal effects.[121] The controversy was the nature of those legal effects, and the adequacy of the directions given of them. Brown was clearly aware that Morley intended to kill, and that Morley wished to co-opt him into the enterprise. In coughing to disguise the noise Morley might make, Brown lent some, albeit very minor, assistance to Morley in that murderous enterprise. If Brown could not rely on a valid defence, these facts would be sufficient to see him convicted for murder as, in the language of the time, a 'principal in the second degree'.[122] Brown argued that the threats of Morley were of sufficient intensity and immediacy as to place him in genuine fear for his life if he did not comply, directly raising the issues of whether duress was, or could ever be, a defence to murder.[123]

B *The Joint Judgment in Morley's Appeal*

The Court, comprised of Bray CJ, Bright and Mitchell JJ, delivered a single judgment dismissing Morley's appeal concerning the adequacy of the insanity directions and the alternative verdict of manslaughter. However, while it appears there was consensus on the insanity appeal points, it is clear that the Court was divided on both whether the judge should have expressly informed the jury about the possibility of returning a verdict of manslaughter, and on the consequences of the failure to give such a direction. While the Court unanimously held ('we all think …') that no properly instructed jury could have returned a verdict of manslaughter,[124] there was disagreement over whether the trial judge ought nonetheless to have highlighted the jury's power to return a verdict of manslaughter ('a majority of us think …').[125] A majority of the Court thought that even if there was an error, it was an appropriate case to apply the proviso.[126] One judge, however, thought that the proviso can 'never be applied to a direction which denies the power of the jury to return the … merciful verdict of manslaughter'.[127] It is not possible, however, to say which judge took this minority view, nor indeed whether there were differently composed majorities for different

120 Ibid 481.

121 Ibid.

122 Ibid 468.

123 Ibid.

124 Ibid 471.

125 Ibid.

126 Ibid; *Criminal Law Consolidation Act 1935* (SA) s 353(1): under the proviso a court hearing a criminal appeal may dismiss the appeal if it accepts that, although there has been some error in the trial, there was no 'substantial miscarriage of justice'.

127 Brown [1968] SASR 467, 473.

issues. The judgment remains, in consequence of s 349(2), a single joint judgment. The fact of disagreement is revealed only by the use of language of 'majority' in contrast to the more inclusive 'we all think', 'we agree' or 'in our opinion',[128] and by the phrase '[o]ne member of the Court thinks.'[129] The composition of the majority in Morley's appeal remains undisclosed, and while there was disagreement it clearly did not take on sufficient intensity to justify a separate dissent.

C *The Emergent Dissent in Brown's Appeal*

This approach stands in stark contrast to the judgment in relation to the appeal by Brown, where it is revealed gradually that there is a split in the Court of sufficient intensity as to justify a separate dissent. The collective Court begins the discussion of Brown's appeal with little indication of internal disagreement. In setting out the grounds of appeal, summarising the facts and describing the directions given,[130] the impression is given of a united Court. It is not until judgment is passed on the adequacy of the trial judge's directions, some six pages into the decision, that it becomes apparent that the initial appearance of unanimity is misplaced. The language suddenly shifts to the majoritarian language seen in Morley's appeal ('[t]he view above expressed commands the support of the majority of us'),[131] with the possibility of duress *ever* being a defence to murder subject to profound disagreement in the Court. However, in contrast to the position in Morley's appeal, that disagreement is drawn into the open and made explicit, with the identity of the disputants revealed. In disclosing that they are, 'with regret, not in accord with the learned Chief Justice',[132] Bright and Mitchell JJ become active personal participants in the judicial discourse, adopting a mantle of personal responsibility otherwise absent in the anonymity of Morley's appeal. When, six pages later, Bray CJ delivers his Honour's separate judgment on the issue of duress, it is as the Chief Justice as an individual judge. From the muddle of single, majority judgment, a separate dissent emerges. As a result, the dissent of Bray CJ in *Brown* is striking for the way it illustrates — by its very form — the value of dissent in enhancing the quality of judicial decision-making, and as more simply than a vanguard of legal change.

1 *The Decision of the Majority*

The majority were unequivocal: duress could *never* 'excuse a person who performs an act which he intends to be in furtherance of a proposed murder.'[133] In contrast to the implied disagreement in Morley's appeal, the majority were at pains to justify their adoption of a different approach to the Chief Justice.[134] In reaching their conclusion,

128 Ibid 471, 476.

129 Ibid 473.

130 Ibid 479–85.

131 Ibid 485 (Bright and Mitchell JJ).

132 Ibid.

133 Ibid.

134 Ibid.

Bright and Mitchell JJ relied upon two Privy Council cases: *Sephakela v The Queen* ('*Sephakela*')[135] and *Rossides v The Queen* ('*Rossides*').[136] As reports of both cases were not readily available the judgments were set out in full in the majority judgment of *Brown*.[137] *Sephakela* involved a case of ritual killing in Lesotho. As there was no evidence of compulsion, the Privy Council found it unnecessary to express an opinion on the potential availability of duress as a defence to murder.[138] In *Rossides*, the accused was convicted of murder for shooting the deceased under threat of his own death if he did not. The issue of duress was raised in argument, but in dismissing the appeal the Privy Council gave no reasons at all.

Drawing on these cases, Bright and Mitchell JJ observed that it 'had never been expressly decided that duress can excuse murder' but that 'there are many cases in which a view has been expressed that it cannot, or probably cannot.'[139] The majority felt that it was against the public interest to allow the defence on the basis of difficulties of identifying the sufficiently immediate and grave threats, and the proximity of the act to the killing.[140] These considerations — briefly expressed, and neither explored nor justified — led the majority to hold that duress could nerver, as a matter of law, excuse Brown. On that basis the appeal was dismissed.

2 *The Dissent of Bray CJ*

The decision of the majority, with its uncritical citation of two obscure, marginally relevant decisions and little further analysis, stands in stark contrast to the principled labour of Bray CJ. The dissent begins with an explicit recognition of the restriction of s 349(2), and the need, in light of the 'misfortune' of disagreeing on the legal effect of duress, for a separate judgment.[141] In addressing that issue, Bray CJ not only recognises that the 'subject of duress has been discussed by the text writers for three centuries',[142] but briefly and thoughtfully outlines that history. While Hale[143] and Stephen[144] effectively denied that duress could *ever* be a defence to *any* criminal act,

135 [1954] *Criminal Law Review* 723.

136 [1957] *Criminal Law Review* 813.

137 *Brown* [1968] SASR 467, 485–7, 487–90 (Bright and Mitchell JJ).

138 Ibid; Glanville Williams, *Criminal Law: The General Part* (Stevens & Sons, 2nd ed, 1961) 753: the majority were dismissive of Williams' statement that the Privy Council had 'assumed that duress was a defence'.

139 *Brown* [1968] SASR 467, 489 (Bright and Mitchell JJ).

140 Ibid 489–90.

141 Ibid 491 (Bray CJ).

142 Ibid 492.

143 Sir Matthew Hale, *Historia Placitorum Coronæ: The History of the Pleas of the Crown* (T Payne, 1800) vol 1, 49–52.

144 Sir James Fitzgerald Stephen, *History of the Criminal Law* (Macmillan, 1883) vol 2, 107.

and East[145] and Blackstone[146] would have excluded the defence in cases of murder, more recent authors regarded the matter 'as very much at large'.[147] In light of this uncertainty, Bray CJ sought to develop a principled position by deconstructing the cases and relying on 'general reasoning'.[148] His Honour began with the cases on treason ('the most serious of crimes') to illustrate clearly that 'some types of duress may be a defence to some kinds of treason',[149] even if it is excluded in other cases. His Honour then drew an analogy with murder, concluding that 'authorities which say … that duress is not a defence to murder generally do not necessarily prove that it is not a defence to any conceivable type of complicity in murder, however minor.'[150] In doing so, Bray CJ challenged the 'extreme absolutist views' of Hale and Stephen as not representing the law,[151] arguing that any blanket denial of duress would 'prove too much' and could not 'now be supported'.[152] Instead, by drawing upon treason cases, Bray CJ sought to unpack the theoretical foundations of the defence of duress, and explore the rationale for its restriction in murder cases.

Chief Justice Bray was prepared to accept the general proposition that, in the words of Blackstone, the accused 'ought rather to die himself, than escape by the murder of an innocent'.[153] However, his Honour countered by observing that the force of that proposition is 'obviously considerably less where the act of the threatened man is not the direct act of killing but only the rendering of some minor form of assistance, particularly when it is by no means certain that if he refuses the death of the victim will be averted'.[154]

In critiquing Blackstone, Bray CJ implicitly recognised that the offence of murder has developed in the last 300 years to incorporate extended forms of liability for 'secondary parties' and that the traditional blanket prohibition may be inappropriate to these legal constructs.[155] His Honour illustrated this issue with well-developed examples: the passer-by seized in the street by a gang of murderous thieves, compelled at gunpoint to make misleading comments to the public or the innocent driver compelled to convey a murderer to the victim.[156] In doing so, Bray CJ undermined the absolutism of Blackstone's rationale, as such a blanket exclusion of any duress

145 Sir Edward Hyde East, *A Treatise on the Pleas of the Crown* (J Butterworth, 1803) vol 1, 225.

146 William Blackstone, *Commentary on the Law of England* (19th ed) vol 4, 30.

147 *Brown* [1968] SASR 467, 492 (Bray CJ).

148 Ibid.

149 Ibid 493.

150 Ibid.

151 Ibid 492.

152 Ibid 494.

153 Blackstone, above n 146.

154 *Brown* [1968] SASR 467, 494 (Bray CJ).

155 See also *R v Jogee* [2016] 2 WLR 681: submissions to the Supreme Court cited *Brown* in this context.

156 *Brown* [1968] SASR 467, 494 (Bray CJ).

defence would seem to sever that fundamental connection between legal liability and moral wrongdoing.

Chief Justice Bray went on to explore whether the authorities would compel the adoption of such an approach. A Quebecois case where a prisoner, at gunpoint, handed over a razor to the killer was distinguished on the basis that the relevant Code specifically excluded duress for murder.[157] In contrast to the majority, Bray CJ held that *Sephakela* supported the availability of the defence, as concerns over insufficiency of evidence implied that evidence *could* support that defence.[158] *Rossides* was distinguished as involving an accused as *principal* participant.[159] The construction by Bray CJ of both these cases is preferable to that of the majority, not only because the exposition and analysis is more complete, but because it more easily coheres with the reasoning of the Privy Council.

This construction of the authorities did not compel a denial of duress for secondary participation, and Bray CJ argued that there were 'good reasons on general grounds' for rejecting such a denial. Alluding to his Honour's prior examples, Bray CJ argued that there may be 'easily conceivable' circumstances where a grave and imminent threat was directed to compelling an act only remotely connected to the death of the victim, such 'that the interests of justice were better served by allowing the defence'.[160] It followed that the defence of duress *may* be available in *some* instances of secondary (minor) participation in murder, and as such the directions of the trial judge were erroneous.

However, and recognising the inherent limitations of a dissenting judgment, Bray CJ took a very restrained approach to outlining the scope of such a defence. Rather than fruitlessly attempt to set out a comprehensive test for this form of duress, his Honour restricted himself, identifying five issues that would inform the development of such a test including: first, the requisite scope of the threat; secondly, the requisite nature of the threat, in terms of gravity and immediacy; thirdly, the limits necessitated by the threat; fourthly, restrictions upon the availability for those who place themselves in a position to be threatened; and fifthly, the need for some proportionality.[161] Chief Justice Bray articulated the issue of concern, and suggested such issues could be addressed by drawing analogies from self-defence and provocation.[162] His Honour did not, however, attempt to develop a detailed and comprehensive

157 Ibid 495, citing *R v Farduto* (1912) 10 DLR 669.

158 *Brown* [1968] SASR 467, 496 (Bray CJ).

159 Ibid 497.

160 Ibid.

161 Ibid 498–9; *Howe* [1987] AC 417, 442 (Lord Griffiths). See generally The Law Commission, *Criminal Law: Report on Defences of General Application*, Law Com No 83 (1977): it is worth noting that when the UK Law Commission proposed legislative reform to the defence of duress in 1977, the restrictions on the defence addressed each of the concerns expressly identified by Bray CJ, thereby upholding the inherent logic of the dissent.

162 *Brown* [1968] SASR 467, 498 (Bray CJ).

test for when the defence would be available, stating that such speculation should not 'be carried further in a dissenting judgment'.[163] In dissent, it was sufficient to recognise that neither cases nor general reasoning 'prevent the acceptance of the simple proposition that no type of duress can ever afford a defence to any type of complicity in murder.'[164] This limited claim becomes, however, compelling in light of Bray CJ's analysis and reasoning. In dissent, Bray CJ lays a firm foundation upon which a future court might recognise such a defence.

The quality of that foundation is only confirmed by the dissent's subsequent reception, which illustrates the role of dissent in normative development.

D *The Reception of the Dissent*

The reception of the dissent in the UK, particularly in the case of *DPP (Northern Ireland) v Lynch* ('*Lynch*'),[165] illustrates the way in which a lone dissent may guide and inform subsequent debate. In *Lynch*, the House of Lords heard an appeal arising from 'The Troubles' in Northern Ireland, involving the murder of a police officer by an IRA gunman. Like *Brown*, the case involved a claim of duress as a defence to murder for a principal in the second degree. Indeed, the facts of the case closely mirror Bray CJ's illustrative hypothetical of the driver compelled to convey a murderer to the victim.

The appellant, Lynch, who was not a member of the IRA, received a messenger who informed him that Meehan — a 'well-known and ruthless gunman'[166] — demanded his immediate presence. Lynch knew that 'what Meehan asked to be done had to be done',[167] so out of mortal fear,[168] he complied with the summons. Meehan told Lynch to go with his associate Mailey and seize a car. Mailey held up a car and had Lynch drive it back to Meehan. Lynch then drove Meehan and his heavily armed associates to a particular address.[169] When he asked what was going on he was told 'Bates knows a policeman'.[170] Following directions, Lynch stopped the car in front of a garage. The others ran across the road, a number of shots were fired, the men ran back to the car, and Lynch drove them back to their starting point.[171]

Lynch argued that he was acting under duress,[172] in the genuine and reasonable belief that he would be shot if he did not comply. However, the trial judge held that

163 Ibid 499.

164 Ibid.

165 [1975] AC 653.

166 Ibid 678.

167 Ibid 655.

168 Ibid 674.

169 Ibid 655.

170 Ibid 656.

171 Ibid.

172 Ibid 668.

duress was not available to *any* charge of murder, and did not allow the issue to be put to the jury.[173] The Court of Criminal Appeal upheld unanimously the trial judge's decision.[174] The Court of Criminal Appeal's decision was itself appealed to the House of Lords.

Confronted with a lack of authority and a 'jurisprudential muddle of a most unfortunate kind,'[175] all five Lords referred to the judgment of Bray CJ, with the majority quoting from him extensively. Lord Morris described Bray CJ's dissent as a 'closely reasoned judgment the persuasive power of which appeals to me',[176] and adopted the view that duress 'can be open as a possible defence.'[177] Similarly, Lord Wilberforce turned to the 'important authority' of *Brown* and the 'impressive judgment of Bray CJ in dissent'[178] from which his Lordship quoted extensively. Building on this analysis, his Lordship also held that the defence is available 'in a case of aiding and abetting murder'.[179] Lord Edmund-Davies observed that the issue had never been the subject of even obiter dicta in the House of Lords, allowing the Court 'to make an unfettered decision … in accordance with basic common law principles.'[180] In such a context *Brown* was of particular significance, and not only did Lord Edmund-Davies compliment Bray CJ's 'illuminating review of the relevant material',[181] and quote extensively from the dissent, but expressly adopted his Honour's conclusions.[182]

Even the Lords in the minority felt compelled to respond to Bray CJ's dissent. Lord Simon adopted a hard line that the law had never recognised such a defence, and that authority and 'closely cognate juridical concepts'[183] suggest it should not be available. After exploring the issues of underlying policy, his Lordship turned to discussion of authority. With contempt dripping from his pen, his Lordship stated that:

> Fortunately, I am absolved from reviewing them in detail, since that has been done by my noble and learned friends. My only misgiving is that such an impressive muster should be sent packing so ignominiously. Poor Hale, poor Blackstone; wretched Russell and Kenny; poor, poor Lord Denman. But at least they are in good company. There are all those famous jurists, headed by Stephen … are like the denizens of the first circle of Hell, who, for all their wisdom and virtue, lived in such benighted times as to have forfeited salvation … For, in truth, their voices

173 Ibid 678.

174 Ibid.

175 Ibid 704 (Lord Edmund-Davies).

176 Ibid 677 (Lord Morris).

177 Ibid.

178 Ibid 682 (Lord Wilberforce).

179 Ibid 685.

180 Ibid 713 (Lord Edmund-Davies).

181 Ibid 714.

182 Ibid 715.

183 Ibid 685 (Lord Simon).

> were unanimous that duress is no defence to murder. *What is to be set against them? A dissenting judgment of Bray* CJ …[184]

Even in his Lordship's disdain, Lord Simon illustrates the significance of Bray CJ's judgment, minimising it with mockery rather than engaging with the substantive arguments. Lord Kilbandon relies upon Bray CJ's conclusion that duress does not constitute a defence to one who actually kills the victim,[185] though rejects the distinction 'between the defence open to a principal in the first degree and those open to a principle in the second degree'.[186]

Effectively, the majority in *Lynch* adopted Bray CJ's position that duress should be available as a defence to a charge of murder in the second degree. Moreover, *all* judges felt compelled to engage with Bray CJ, even when rejecting his Honour's conclusions. The quality of his Honour's reasoning, sharpened by its dissentient nature, set the framework and conceptual foundations for the debate.

In the subsequent case of *Abbott v The Queen*,[187] the Privy Council refused to extend the defence to a principal participant who took part in the actual killing,[188] though the dissenting opinion argued that there was 'no acceptable basis of distinction' between a principal in the first and in the second degree.[189] Both opinions again quoted from the 'illuminating judgment'[190] of Bray CJ.[191] In *Howe*,[192] the House of Lords was faced with a claim for duress by an accused involved in the actual killings. The House of Lords accepted that the distinction between the 'actual killer' and the 'aider and abettor' was 'illogical'.[193] Rather than extend the defence, their Lordships overturned *Lynch* and denied the defence to all charges of murder.[194]

This difficulty in drawing the line between the actual killer and the aider and abettor has troubled Australian courts. In *R v McCafferty*[195] Glass J explicitly adopted the conclusions of Bray CJ[196] in order to find that duress is a complete defence to minor participation in murder, and went further to allow it as a qualified defence

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184 Ibid 695 (emphasis added).

185 Ibid 701 (Lord Kilbandon).

186 Ibid 702: expressly agreeing with the majority in *Brown* [1968] SASR 467.

187 [1977] AC 755.

188 Ibid 763, 764, 767.

189 Ibid 770 (Lord Wilberforce and Lord Edmund-Davies).

190 Ibid 773.

191 Ibid 763, 764.

192 *Howe* [1987] AC 417.

193 Ibid 442 (Lord Griffiths).

194 *Howe* [1987] AC 417, 436 (Lord Hailsham), 437–8 (Lord Bridge), 438 (Lord Brandon), 445 (Lord Griffiths), 453, 456 (Lord Mackay).

195 [1974] 1 NSWLR 89.

196 Ibid 91 (Glass J).

for major participation.[197] This latter point was subsequently overruled in *R v McConnell*[198] where the Court again referenced Bray CJ.[199] In *R v Harding*,[200] the Victorian Supreme Court held that the defence was inapplicable in *all* murder cases, but felt compelled[201] to spend three pages of reasoning exploring in depth the dissent of Bray CJ.[202] As in *Howe*, the Court refused to find a distinction between minor and major participation in murder.[203]

Courts have continued to struggle with the difficult issue of whether duress should *ever* be a defence to murder. It does appear that judges who excluded the defence did not feel its denial would work any injustice on the given case. In both *Brown* and *Lynch*, there appears to have been a real suspicion as to the bona fides of the accused's stories.[204] In *Howe*, Lord Griffiths even went so far as to observe:

> I am not troubled by some of the extreme examples … such as a woman motorist being hijacked and forced to act as a getaway driver, or a pedestrian being forced to give misleading information to the police to protect robbery and murder in a shop. The short practical answer is that it is inconceivable that such persons would be prosecuted …[205]

The denial of the defence in such circumstances leaves the 'innocent' accused deeply vulnerable to prosecutorial discretion. Moreover, on the available evidence in *Lynch*, it was a situation directly analogous to the hijacked woman, and Bray CJ analysed properly the law on the basis that Brown's version of events was accepted. It was precisely the potential for a strict approach to work profound injustice that led Bray CJ to his Honour's nuanced analysis. While different opinions as to the potential for injustice may have led courts to adopt different approaches to the defence, it remains clear that Bray CJ's dissent has had a powerful normative impact.[206] The power and persuasion of that dissent has dictated the terms of the discourse and influenced profoundly the development of the law, even where its conclusions have not been adopted.

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197 Ibid.

198 [1977] 1 NSWLR 714.

199 Ibid 717, 718 (Street CJ), 723 (Taylor CJ at CL).

200 [1976] VR 129.

201 Ibid 151: this compulsion was explicitly recognised as a result of the strong reliance of counsel on Bray CJ's dissent in *Brown* [1968] SASR 467.

202 Ibid 151–3.

203 Ibid 154.

204 *Brown* [1968] SASR 467, 481. See generally *Abbott v The Queen* [1976] AC 755, 763; *Howe* [1987] AC 417, 429: indeed, on re-trial the jury rejected Lynch's defence of duress.

205 *Howe* [1987] AC 417, 445 (Lord Griffiths).

206 See generally *Goddard v Osborne* (1978) 18 SASR 481, 491; *R v Gotts* [1992] 2 AC 412, 429, 436; *R v Lorenz* (1998) 146 FLR 369, 377: it should be noted that the dissent has also been cited with approval in cases of duress in these other authorities.

However, importance of the dissent is not confined to the role of normative development, and Bray CJ's dissent illustrates — through its evident discipline, integrity and restraint — how a dissent can enhance the performance of the judicial function in all its facets.

VI Defending Dissent

There is a relatively long history of identifying potential threats to judicial independence emanating from within the judiciary itself — what Shetreet refers to as concerns of 'internal independence'[207] — with pressure from other judges improperly distorting substantive decision-making.[208] Heydon reveals what is effectively a new form of this old threat of internal institutional pressure to join 'the herd' in delivering concurrent and joint judgments in the interests of efficiency.[209]

The judicial dissent is on its face redundant: it appears to constitute an anachronistic institutional inefficiency that neither aids the resolution of the instant dispute, nor provides direct normative governance for future conduct. Even judges themselves frequently bemoan the futility of a dissent — often as they go on to deliver such a dissent — though rarely with the candour of Holmes J:

> I am unable to agree with the judgment of the majority of the court, and although I think it useless and undesirable, as a rule, to express dissent, I feel bound to do so in this case and to give my reasons for it.[210]

The question must be posed: why persist with an apparently redundant practice? The simple answer is that the judicial dissent is a highly effective means of promoting the high quality performance of the judicial function. It not only performs a vital ancillary governance role it providing an alternative narrative of the law that can enrich and aid the future development of the law, but it provides a spur to better decision-making for *all* judges in the case, can aid the more complete resolution of the underlying dispute, broadly conceived, and helps hold judges, both dissentients and those in the majority, to account.

Perhaps more than any other judicial practice, the dissent invites personal critique of the individual judge. A dissentient may be demonised as a 'judicial activist' who selfishly undermines legal certainty, or lauded as a visionary reformer who brings

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207 Shimon Shetreet, 'Judicial Independence: New Conceptual Dimensions and Contemporary Challenges' in Shimon Shetreet and Jules Deschenes (eds), *Judicial Independence: The Contemporary Debate* (Martinus Nijhoff, 1985) 590, 598–9, 642.

208 Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996* (Martinus Nijhoff, 2006) vol 3, 1567–70; McIntyre, above n 3, 131–2: provides a general overview of the concerns of internal independence as a potential source of improper influence on judicial decision-making.

209 Heydon, 'Enemy Within', above n 6, 217.

210 *Northern Securities Co v United States* 193 US 197, 400 (1903).

responsive justice to the law. Where that line is drawn may largely depend upon whether one agrees with conclusions reached,[211] which, in turn, depends upon political and social values that may vary significantly over time. However, the very fact of such arguments over the merit or otherwise of the dissentient's position not only hold a spotlight to judicial conduct, in both particular and general instances, but invites broader reflection on the merit of the substantive position. Given the discursive nature of law, the intense debates often provoked by a strong dissent themselves contribute the development of the law.

The judicial dissent directly promotes both the dispute resolution and normative governance objectives of the judicial function, while indirectly, as a tool of judicial accountability, promotes the excellent performance of that function generally.

These ideas are explored through the concrete illustration of Bray CJ's dissent in *Brown*, a case chosen for its *juridical* rather than *political* quality. Though literally a matter of life and death for the accused, it was not a subject to inspire marches in the streets. This dissent has largely faded from memory in Australia.[212] However, the dissent is a particularly excellent device for demonstrating, by both its form as well as its substance, not only *how* a dissent should be delivered, but *why*. With particular efficiency and clarity, Bray CJ's dissent demonstrates how a dissent can both directly and indirectly further the excellent performance of the dispute-resolution and normative governance aspects of the judicial function. While Bray CJ's dissenting support for a re-trial may appear scant comfort for Brown, such support would have real significance in any application for clemency. This was, after all, a man sentenced to death for acting, in fear of his life, on an order to 'cough' at a designated time. Even in dissent, the guidance of Bray CJ's decision provided a pathway for more just resolution of the underlying dispute. The normative consequences of the dissent are more pronounced, with Bray CJ's principled analysis of the issues shaping and directing the conversation on the defence of duress in murder for a generation. By contributing to the 'marketplace of competing ideas'[213] and infusing 'different ideas and methods of analysis'[214] of the issue of duress, Bray CJ influenced — by the persuasive appeal of his Honour's ideas rather than the judicial authority of the judgment — judges in Australia and abroad. That normative contribution extends beyond extant statements of law, and lies like a rake resting in the grass, ready to rear up when the next judicial foot treads these uneasy grounds. By bringing great discipline and integrity to his Honour's considered search for underlying principles — in the face of sweeping judgments of legal giants, competing policy concerns and an

211 Justice Michael Kirby, 'Judicial Activism: Power without Responsibility? No, Appropriate Activism Conforming to Duty' (2006) 30 *Melbourne University Law Review* 576, 578, 591. See also Justice Michael Kirby, *Judicial Activism: Authority, Principle and Policy in the Judicial Method* (Sweet & Maxwell, 2004).

212 This faded recollection is no doubt partly due to the rarity of cases in which the issue is raised, and partly due to the fact that, in an age where legal research occurs in front of a computer, the case is not available online.

213 Brennan, above n 58, 435. See also Kirby, 'Judicial Dissent', above n 53, 393–4.

214 Brennan, above n 58, 436.

unsympathetic defendant — Bray CJ delivered a compelling and concise judgment that nevertheless evidenced a deeply reflective awareness of the limitations and institutional costs of a dissent. The publication of this restrained dissent can only have enhanced Bray CJ's reputation as a judge of quality and integrity.

Further, the joinder of the two appeals in *Brown* in the context of s 349(2) of the *Criminal Law Consolidation Act 1935* (SA) (as amended), provides rare and direct illustration of how a published dissent can enhance the performance of the judicial function. The publication of this dissent had a demonstrable effect as a mechanism of internal accountability, spurring on the majority to more deeply engage with the issues and more fully explain their own reasoning in response to Bray CJ's dissent. Morley's appeal saw opaque reference to divergences in the Court by phrases such as 'a majority of us'. Conversely, the dissent in Brown's appeal saw a clear identification of the individual judges and the position they took. Justices Bright and Mitchell became actors in the discourse, and with the strength of their position challenged by Bray CJ, they were personally called upon to justify their approach. In challenging them to engage in better quality decision-making, the published dissent more effectively held them to (external) account.

This enhanced internal and external accountability, of both the majority and the dissentient, and the greater quality of the normative statements all round, provides a graphic illustration of the benefits of the published dissent in furthering the excellent performance of the judicial function. Such a dissent leaves the law richer, and the court stronger, for its having been given.

Of course, not every dissent enhances judicial performance, just as not every joint judgment denotes 'herd' behaviour. Nevertheless, the institutional value of a practice such as dissent must be assessed by reference to what it is *capable* of achieving. Illustrations such as *Brown* highlight just how effective and efficient a high quality dissent can be in promoting the objectives of the judicial function. Understood in the broader way, criticisms of dissent that focus on its apparent inefficiency or redundancy become unconvincing. In drawing attention to an apparent trend for undue pressure to be placed on judges to join single judgments in the interest of efficiency[215] and 'legal certainty',[216] Heydon has succeeded in initiating a debate on judicial practices often taken for granted. Dissent remains a supremely effective institutional practice, and while there is some merit in the argument that dissent should be used sparingly,[217] it should remain a vital tool in maintaining the health and vitality of a judicial institution — and indeed the law itself — far into the future.

215 Heydon, 'Enemy Within', above n 6, 220–1.

216 Ibid 213.

217 Bergman, above n 15, 89. See also Lord Neuberger, 'No Judgment — No Justice' (Speech delivered at First Annual BAILII Lecture, London, 20 November 2012) [28] <http://www.bailii.org/bailii/lecture/01.html>.

DISPENSING JUSTICE UNDER PRESSURE - DICTA BY HON. JUSTICE SALIHU MODIBBO ALFA BELGORE,FORMER CHIEF JUSTICE OF NIGERIA ON OUSTER CLAUSES - In the Supreme Court of Nigeria, General Sanni Abacha & Ors v. Chief Gani Fawehinmi [2000] NGSC 1; (2000) 4 NILR 28 (28 April 2000)

BELGORE, J.S.c. (Dissenting on the Cross-Appeal): I have read in draft after having a conference the judgment of my learned brother, Achike JSC and I am in full agreement with him that the main appeal must fail. In international relations nation parties resolve several aspects by treaties and protocols some of which either exist already in their domestic statutes or are adopted into domestic laws by acts of parties mentioned. Whilst Nigeria in her 1979 Constitution had a part exclusively devoted to Fundamental Human Rights some of which are more explicit than the African Charter on Human and Peoples' Rights, the Country none the less went ahead to incorporate the Charter into her domestic laws by an Act of Parliament it referred to as "This Act may be cited as the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act", The Act then sets out as a Schedule the Articles of the Charter. The difference between that Act (Chapter 10, Laws of the Federation of Nigeria 1990) and Fundamental Rights in the Constitution is that no method was prescribed for enforcing the Rights there under.

There is provision in the Charter for a Commission to be set up, but since 19th January 1981 when the Charter was made in Banjul, The Gambia, no Commission has been set up. The Commission itself by the nature of the Articles is a monitoring and research body rather than a judicial body with enforcement powers. By their nature, treaties are abided with in good faith, especially through a prolonged treaty practice and most invariably through the habit of transforming some aspect of treaties from JUS STRICTUM into JUS AEQUUM, But many treaties are naturally destroyed by circumstances that change the nature of contracting parties or change of circumstance of the subject-matter of the treaty no more existing. But of recent are new developments, especially in newly emerging countries with a problem of constitutional and political stability. Nigeria is a typical example. it has been subjected to many coups d 'etat than constitutional and democratic governance. Thus when the African Charter on Human and Peoples' Rights was by Parliament adopted into Nigerian Statutes with commencement date on 17th day of March 1983. the country was under a democratically elected government. The Fundamental Rights in the 1979 Constitution certainly gave effect to the Charter before that: Federal Parliament formally adopted it. Thus H Article I or Chapter I of the Charter reading: "The member States of the Organization of African Unity parties to the present Charter shall recognize the rights. duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them," anticipated not only domestic law reflecting the rights, duties and freedoms enshrined in the Charter but if possible Constitutional provisions. By the end of 198:1 there came in the Military via the usual coup d'etat suspending the Parliament (Legislature) and taking over

both the Executive and Legislative powers of the State. The Judiciary was left untouched but the Fundamental Rights in the Constitution were suspended. As the Military incursion into governance was through the force of arms and succeeding thereby it was their style to make their decrees by which they govern superior to the Constitution. The net result is clear. Whereas the Constitution was the fountain of all laws where any other law is in conflict with it, it is void. the Military Decrees now became superior to the Constitution. It is therefore clear that once the Military regime got entrenched in governance it is natural for self-preservation to promulgate decrees that curtail liberties, a very unfortunate legal situation. Thus early in 1984 State Security (Detention of Persons) Decree was promulgated. Each successive Military regime adopted or modified the decree known popularly as Detention Decree. The respondent was hold under this Decree except four clear days before the Order was signed.

As the Decrees of the Military regimes always contain ouster clauses to bar interference by the judiciary the judiciary made earlier skirmish in 1970 in Lakanmi's case but the Military descended heavily on judiciary by Decree No. 28 of I970 called Supremacy Decree. The only way to stop these Military overwhelming curtailment of freedoms is to make their coup fail. but once they are in control it was a futile effort to adjudicate where jurisdiction is clearly ousted by Decree. Thus the coup d'etat of 1981 December and the Constitution (Suspension and Modification) Decree of 1984 put into abeyance the Fundamental Rights in the Constitution, which as I have said earlier is a forerunner of the adoption of the Charter and of course the Charter itself by implication. Coup d 'etat a treasonable offence but that is only when it fails. The Charter. just as the Fundamental Rights in the 1979 Constitution was by implication suspended. If the Charter was not suspended even by implication, it would have run counter to the Decree of the Military which in essence makes the Charter void. This amounts to breach of treaty obligation by Nigeria, which is a political rather than a judicial act. In countries which have Constitutions albeit. under a dictatorship, the municipal law and the Constitutions are held in superior status than any international law like a treaty. Sometimes municipal statute on the same subject-matter like the treaty in issue is preferred by municipal courts. The net result in many cases is that municipal Courts may not automatically apply treaties entered into between their State and foreign States if those treaties would modify domestic laws. However. if the domestic laws in question are modified to accommodate the articles of the treaties municipal courts will enforce them, not because they are treaties but for the reasons only that they have become parts of municipal laws, At any rate Section 1 (2) (b)(i) of Federal Military Government (Supremacy and Enforcement of Power) Decree No.12 of 1984 providing: "No civil proceedings shall lie or be instituted in any Court for or on account of or in respect of any act. matter or thing done or pursuant to any Decree or Edict and if such proceedings are instituted before or after the commencement of this Decree the proceedings shall abate. be discharged and made void". ousts any jurisdiction by Court including the adopted Charter which was an existing law as of the time the action leading to this appeal was instituted. I therefore I agree with my learned brother Achike JSC that the detention of the respondent, other than for the first four Jays not covered by Detention Order in question could not be challenged in any court of law. The cross-appeal fails on this. The four days not covered by the Detention Order could then be tried as ordered by the Court of Appeal. I therefore dismiss the main appeal as well as the cross-appeal. I make no order as to costs. I also dismiss the cross-appeal for the above reasons and the reasons in the judgment of Achike JSc

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SPECIAL MESSAGE TO THE PRESIDENT OF THE UNITED STATES OF AMERICA JOE BIDEN ON NATIONAL SECURITY OF CANADA, UK, NATO, ISRAEL, INDIA, JAPAN, SOUTH KOREA, AUSTRALIA AND NEW ZEALAND

Dear Mr. President,

The invention of hypersonic missiles by the perceived enemies of the United States would be a huge national security concern. The speed with which they are delivered will wreak havoc resulting in breaking the constitutional order of the United States which it had cherished for two centuries. The attack on the U.S. satellite communication facilities in space could be the first strike option against the U.S. It could cut off the President of the U.S from the Nation, from the Military Commanders and the civil government as a result you will not be able to communicate with U.S allies viz., Canada, UK, Europe/ NATO, Israel, Japan, South Korea, India, Australia, New Zealand, and elsewhere. Your position as Commander-In-Chief of the U.S forces would be meaningless if you are unable to communicate with the Nation. The key allies of the U.S., would lose confidence in your ability to wage a coordinated battle against the perceived enemies. The authoritarian regimes in the World would feel triumphant and forge new strategic alliances.

We, KC – The King's Counsel Magazine, call upon you to immediately appoint a Presidential Commission to inquire into the efficacy of the U.S constitution and whether it should be suitably revised or amended to deal with the new threats. This will ensure that the security of the strategic allies of the U.S too is guaranteed in case such an eventuality takes place.

OVER TO YOU MR. PRESIDENT

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